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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 417

THE UNITED STATES OF AMERICA AND MESTA MACHINE COMPANY, *Appellants*,

vs.

COUNTY OF ALLEGHENY, PENNSYLVANIA

BRIEF IN BEHALF OF THE MEMBER CITIES OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS AS AMICI CURIAE

Appeal from the Supreme Court of the State of Pennsylvania

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SUMMARY OF ARGUMENT

The fundamental weakness of the Government's case is its reliance upon title which it does not have. The Government claims ownership of certain machinery in the Mesta mill; actually title to this machinery is in the Mesta Machine Company and not the Government.

The Government's claim of ownership rests solely upon a provision in its contract with Mesta, an independent contractor engaged in manufacturing field guns for the Government on a cost-plus-fixed-fee basis. The contract provides that title to the machinery acquired by Mesta in connection with the performance of the Government's contract shall be vested in the Government upon its acceptance at the Mesta plant by the contracting officer for the Government. The contract provides for the "leasing" of this machinery to Mesta for one dollar for the term of the contract.

The sleight-of-mind operation by which title to the machinery which was in Mesta was divested and transferred to the Government without change of possession or control and the same machinery "leased" to Mesta, did not vest title in the Government as against third persons.

With the exception of some obsolete lathes delivered from the Government arsenal, none of the machinery was ever in the possession of the Government. Mesta ordered it, installed it, paid for it, marked it with its own serial numbers,—the Government reimbursed it for the cost. Title to the machinery thus acquired by Mesta was clearly vested in Mesta. The agreement between Mesta and the Government with respect to the title to the machinery, while binding as between the parties, was ineffective as to third persons.

Under Pennsylvania decisions, a transfer of title to personal property unaccompanied by change of possession or control is wholly invalid as to third persons. The "acceptance" of the machinery by the contracting officer for the

Government at the Mesta plant, without charge of possession, did not constitute the exercise of such control as meets the requirement of established Pennsylvania law for the transfer of title to personal property, valid as against third persons.

The Pennsylvania assessment statute provides for the assessment of all real estate, including mills and manufactories, for purposes of ad valorem taxation. In computing the value of a mill, Pennsylvania decisions construe all machinery forming an integral part of a mill as real estate, irrespective of its severability from the freehold and regardless of the ownership of the machinery as between the parties.

Pursuant to statutory direction, the taxing body of Allegheny County, Pennsylvania, assessed the Mesta mill. While the assessment was made against the mill, the valuations placed upon the land, buildings and machinery are separately shown. Included in the assessment was the value of certain machinery which had been acquired by Mesta in connection with the manufacture of field guns for the United States Government under its cost-plus-fixed-fee contract. The taxable value of the mill as real estate was increased by $618,000 as a result of the valuation placed upon the machinery acquired in the performance of the Government contract.

Under Pennsylvania law the taxing authorities can elect to tax either the record owner or the real owner of real estate. However, the taxing body had no choice between a record owner and a real owner in the case at bar. Mesta was the only entity against whom the taxing body could impose an assessment for ad valorem taxes. There is no tax imposed by the Pennsylvania taxing statutes upon machinery. Machinery which does not form a part of a mill or manufactory is not taxable. Machinery which forms a part of a mill or manufactory is not taxable *qua* machinery; it simply increases the taxable value of the mill or manufac-

tory as real estate. Since the Government is not the owner or operator of the mill, the taxing authorities could not have elected to tax the Government as either the real or the record owner. Mesta alone could be assessed, for Mesta alone owns and operates a mill which is subject to assessment for ad valorem taxes.

The Government contends that the tax is discriminatory because Mesta has no right of reimbursement from the Government, aside from contract. This argument is fallacious because it is based upon the untenable premise that such a right of reimbursement would be available to Mesta against private parties claiming title in similar circumstances. The record owner of a mill has no right of reimbursement from the owner of a portion of machinery forming a part of such mill. The only right of reimbursement recognized by Pennsylvania decisions is the right of the holder of naked title to real estate to recover from the beneficial owner of such real estate.

The legal incidence of the tax falls squarely upon Mesta and not upon the Government. The fact that the Government by contract has agreed to reimburse the contractor for local taxes imposed in connection with the performance of the Government contract does not, under the recent decisions of this court, confer any immunity from taxation upon the contractor. Cost-plux-fixed-fee contractors have been held by this court to be independent agents and not instrumentalities of the Government. Even though the direct effect of the tax is to increase the cost to the Government, no constitutional immunity exists.

ARGUMENT

The Congress of the United States has not seen fit to exempt from local taxation cost-plus-fixed-fee contractors manufacturing war material for the War and Navy Departments. The Federal Government is attempting to establish such tax immunity by means of judicial determination. It asks this Court in the case at bar to hold that the mere reservation of title by the Government to buildings or machinery purchased by cost-plus contractors immunizes such property from all local real estate taxes. Such a decision would set loose in the law an untenable legal doctrine of far-reaching implications.

The tax involved in the instant case is levied upon machinery assessed at $618,000. The Government asserts in its brief that through the War and Navy Departments and the Maritime Commission the Government owns at the present time seven and a half billion dollars in property which is located on private land or which is operated under private contracts. To sustain the validity of ad valorem taxes on such machinery could substantially increase its cost; to strike such a large sum from the tax rolls would clearly deal a body blow to local governments throughout the country.

Cost-plus-fixed-fee contracts were adopted by the Government in the interest of celerity and economy in the manufacture of the implements of war. By the utilization of established plants throughout the country and the subsidizing of their equipment for war purposes, great savings in time and money were effected. The location of these plants was a matter of military strategy predicated upon factors that need not be considered here. Heavily increased municipal services are required in all communities where large war contracts were placed in order to serve and protect the influx of large numbers of war workers. To nullify all local taxes applicable to such plants,

while imposing greater costs upon local governmental units because of them, would unquestionably result in an uneven distribution of the cost of war.

Any increased cost to the Government resulting from the imposition of the tax will be diffused throughout the country as a whole. If the burden is thrown wholly upon local governments where the war plants are located, they alone will bear that burden. Such local governments will be deprived of the necessary revenue to provide the police and fire protection, health and sanitation facilities and other services necessary for the protection and welfare of the persons and property brought into the community as a result of the war. The only group benefiting by the invalidation of these taxes would be the private contractors who would thus escape bearing a proper share of the cost of local governmental service.

It is in the earnest belief that the position of the Federal Government is unsound, as well as inequitable, that this amicus curiae brief is filed by the National Institute of Municipal Law Officers, which comprises 386 cities and political subdivisions in 46 States. The basic tax structure of local governments is predicated upon receipts derived from the taxation of real estate. The regression in real estate values throughout the country has already created serious financial problems for local governments. The immunity from local taxation of the extensive real estate holdings of the Federal Government has intensified this problem. Despite the trend of recent decisions of this Court narrowing the doctrine of Federal immunity, the Government seeks to revert to the repudiated doctrine of complete immunity for everyone who trades with the Government and everything the Government touches.

The Acquisition of the Machinery

The Mesta Machine Company is the owner of a heavy industrial plant located in West Homestead, Allegheny County, Pennsylvania, where it has manufactured rolling

mill and other machinery for many years. Title to the buildings and to the land on which they are located is in the Mesta Company. Under a taxing statute of Pennsylvania applicable to Allegheny County which provides for the assessment of all real estate, including mills and manufactories, for ad valorem taxes, the Mesta mill—buildings, machinery and land—is assessed as real estate.

On October 30, 1940, Mesta entered into a contract with the United States for the production of large field guns on a cost-plus-a-fixed-fee basis, under authority of the Act of July 2, 1940, c. 508, 54 Stat. 712. In addition to the machinery in the Mesta plant, certain specialized machinery and machine tools were required for the manufacture of these guns, such as lathes, planes, pressers and milling machines. All the requisite machinery and machine tools were large and of the stationary and power-driven type.

The contract between the Government and Mesta provided that the machinery to equip the plant be acquired by Mesta in three ways: (1) purchase by Mesta from other machine manufacturers, (2) manufacture by Mesta at its plant, and (3) remodeling and repairing by Mesta of certain equipment owned by the Government to be delivered to Mesta from its arsenal. Mesta acquired most of the necessary machinery from other manufacturers,[1] manufactured one machine at its plant, and repaired and remodeled eight obsolete lathes delivered to it from the Government arsenal. (R. 26.) All of the machinery was installed in the Mesta plant in specially constructed foundations built to accommodate each type of machine and became an integral part of the mill. (R. 20.) The machines were secured by bolts and removable without damage to the building (R. 21).

With the exception of the machinery procured from the

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[1] The assessed valuation of the machinery acquired by Mesta from other tool manufacturers was $444,000; the machinery manufactured by Mesta, $14,000; the lathes owned by the Government and supplied from its arsenal, $160,000.

Government and renovated at the Mesta plant, none of the machinery was ever in the possession of the Government. Mesta bought it or made it; the Government reimbursed it for the cost. The contract between Mesta and the Government purports to vest title in the Government to all machinery, equipment and material acquired by Mesta in the performance of its contract with the Government (R. 46).

The Imposition of the Tax

In 1942, the Board of Property Assessment, Appeals and Review of Allegheny County, Pennsylvania, revised the assessment made on the Mesta plant during the 1940-1941-1942 triennial for the purpose of including in the assessment for ad valorem property taxes additional buildings, land and machinery which had been acquired by Mesta subsequent to the preceding triennial, in connection with the performance of the cost-plus contract with the Government. The assessment was made pursuant to the provisions of the Act of May 22, 1933, P. L. 853, Article 3, Section 201, as amended by the Act of July 2, 1941, P. L. 219, Section 1, 72 Purdon's Penna. Statutes Annotated, Sections 5020-5021. The applicable section reads as follows:

> "Sec. 201—Subjects of Taxation enumerated:
>
> "The following subjects and property shall, as hereinafter provided, be valued and assessed, and subject to taxation for all county, city, borough, town, township, school and poor purposes at the annual rate:
>
> "(a) All real estate to wit: Houses, lands, lots of ground and ground rents, mills and manufactories of all kinds, furnaces, forges, bloomeries, distilleries, sugar houses, malt houses, breweries, tan yards, fisheries, and ferries, wharves and all other real estate not exempt by law from taxation."

The assessment of the plant was increased from $2,555,590 to $3,901,594. The revised assessment was upon the Mesta manufactory as a whole. Under the practice of Allegheny County, the valuation placed upon land, buildings and ma-

chinery is separately shown.[2] The machinery acquired under the Mesta cost-plus contract with the Government was assessed in this break-down at $618,000 (R. 33). The tax attributable to the assessment of the value of the machinery amounted to $5,137.12 (R. 34).

The contract between the Government and Mesta provides that the contractor shall comply with all applicable laws of the State or subdivision thereof in which the work is performed (R. 46), and for the reimbursement of the contractor by the Government for any payments made by the contractor for any State or local taxes which the contractor is required to pay on any machinery or equipment on account of this contract (R. 43, 53).

The Mesta Machine Company appealed that portion of the revised assessment which imposed a tax on the machinery covered under its agreement with the Government, on the ground that reservation of title to the machinery by the Government rendered it non-taxable. The Government intervened in the appeal, asserting that the reservation of title by it prevented the assessment of the machinery as part of the manufacturing plant of the Mesta Machine Company.

It becomes necessary, therefore, to examine the contract between Mesta Machine Company and the Government for the purpose of ascertaining the validity of the provisions reserving title in the Government and the effect of such provisions upon the taxing powers of the local government where the plant is situated.

I. The Government Does Not Have Title to the Machinery

The Government rests its entire case upon title. It claims ownership of the machinery by virtue of the provisions of

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[2] Total assessment on Mesta Plant $3,901,504
On land 293,795
On buildings 1,123,124
On machinery 2,489,085

the contract between it and Mesta reserving title in the Government to all machinery and materials acquired by Mesta in performance of its contract with the Government. It is respectfully submitted that the contractual provisions with respect to title, while binding as between Mesta and the Government, did not effect a legal transfer of title to the Government valid as against third persons.

Article I-H—Title purports to vest in the Government title to all materials, tools, machinery, equipment and supplies for which the contractor is entitled to reimbursement from the Government. The provision is as follows (R. 46):

> "The title to all work under this Title I, completed or in the course of construction, shall be in the Government. Likewise, upon delivery at the site of the work or at an approved storage site and upon inspection and acceptance in writing by the Contracting Officer, title to all materials, tools, machinery, equipment, and supplies, for which the Contractor shall be entitled to be reimbursed under this Title I shall vest in the Government. These provisions as to title being vested in the Government shall not operate to relieve the Contractor from any duties imposed under the terms of this Contract."

Article II-A—Subject Matter provides for the "leasing" to the Contractor of the "Government-owned" equipment (R. 49):

> "1. The Government hereby leases to the Contractor the Government-owned equipment, which the Contractor will have installed pursuant to the provisions of Title I hereof."

Article II-B—Term provides that the term of the lease shall be during the times guns are manufactured under this contract or any supplement thereto (R. 49).

Under *Article II-C—Rental,* the contractor agrees to pay the Government as rental for the entire term or any extension thereof the sum of one dollar (R. 49).

Article II-E—Termination provides that within ninety days after performance of the contract, contractor shall ship the equipment to a point designated by the contracting officer of the Government (R. 50).

In determining whether title has vested as against third persons, the Government is subject to the legal rules applicable to private transactions. One of the fundamental requirements for the transfer of title to personal property in Pennsylvania is that there be a delivery of possession from the transferor to the transferee. Words alone are not enough. The Government attempted to accomplish a transfer from Mesta to it of title to the machinery in the instant case without any change of possession, but merely by providing for the vesting of title in it upon the "acceptance" of the machinery by the contracting officer for the Government *at the Mesta plant* (R. 46).

The "inspection and acceptance" of the machinery by the contracting officer simultaneously with its inspection and acceptance by Mesta agents, in no manner affected the exclusive possession and control of the machinery by Mesta (R. 27). None of the machinery bore any marks of ownership by the Government (R. 20). Most of the machinery bore serial numbers corresponding to serial numbers used in numbering Mesta's regular machinery. (R. 20, 21, 22.) These numbers were cut directly into the machine or stenciled on identification tags attached to the machine (R. 20). Those machines that had no serial number of Mesta were unmarked. The testimony of the assessor is uncontradicted that when the assessment was made none of the machinery was identified by tags or other marks to indicate Government ownership.

Nor was there any change in the control of the machinery. Mesta had the identical possession and control over this machinery that it had over the machinery not covered by the Government contract. The Government exercised no control over it. The contract between the parties contemplated full control by Mesta, for Article II-D-1 (R. 49) spe-

cifically provides that the contractor may use this machinery for *general purposes* as well as in performance of the Government contract. While the Government states that the machinery could be used by Mesta only for work on field guns (Brief of the United States, p. 21, the contract clearly states otherwise.[3]

The conclusion is ineluctable that Mesta is the owner of the machinery. Mesta ordered it, Mesta was billed for it, Mesta received it, Mesta paid for it. The marking of the machinery with serial numbers corresponding to the serial numbers used throughout the Mesta plant, the exclusive control over the machinery by Mesta, the payment of its cost by Mesta,—all are consistent with ownership in Mesta and inconsistent with ownership in the Government.

With the exception of eight lathes delivered to Mesta from the Government arsenal for renovation, none of the machinery was ever in the possession of the Government.

Title to the machinery purchased by Mesta was directly vested in it by the manufacturer and supplier thereof. The reimbursement by the Government of the purchase price did not change the title to the machinery, nor do the provisions of Article I-H of the contract, of themselves and unaccompanied by a change of possession, effect a legal transfer of title valid as against third persons.

A method was provided in the contract between the Government and Mesta for direct acquisition by the Government of machinery to be used by Mesta in its plant. *Article I-D-2* provides:

> "The Government reserves the right to furnish any equipment or materials necessary for the completion

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[3] *Article II-D—General Terms and Conditions.* (R. 49.)

1. The Contractor shall not use any of the equipment herein leased for any purpose other than the manufacture of Guns, • • • complete, without the prior approval in writing of the Chief of Ordnance or his duly authorized representative, except that the *Contractor may use for general purposes such machinery and equipment* as is purchased or furnished to supplement its existing facilities. (Italics supplied.)

of the work under this Title I upon so notifying the Contractor prior to any commitment by the Contractor therefor." (R. 43.)

The Government did not exercise this right save as to the Government-owned lathes.

Article I-G(c) provides for the assignment of the contractor's purchase rights to the Government (R. 46):

"The Contractor hereby agrees that it will:

* * *

"(c) Unless this provision is waived in writing by the Contracting Officer, reduce to writing every contract in excess of two thousand dollars ($2,000.00) made by it for the purpose of the work under this Title I for services, materials, supplies, machinery, or equipment or for the use thereof; insert therein a provision that such contract is assignable to the Government; make all such contracts in its own name, and not bind or purport to bind the Government or the Contracting Officer thereunder."

Despite this provision which required contracts by Mesta for the purchase of equipment and machinery to be assignable to the Government, it is significant that no such assignment of purchase rights was ever made. Title to the machinery was in fact acquired by Mesta; the Government elected not to acquire title by direct purchase from tool-manufacturers or by assignment. In the absence of acquisition of valid title by the Government in the first instance, the Government could acquire title from Mesta only by a transfer of title accompanied by a change of possession. Since the possession and control of the machinery by Mesta was in no manner disturbed by its contract with the Government, Mesta's original title was never divested. As a consequence, legal title, valid as against third persons, was never acquired by the Government.

The law is well settled in Pennsylvania that a sale of personal property leaving the vendor in possession, with-

out the exercise of any control over the property and without doing anything to indicate a change in ownership, is fraudulent as against third persons.

While the decisions do not set up an unbending test of the sufficiency of delivery and retention of possession to be applied in all cases, it is clear that to transfer title the purchaser must take such control of the property as the circumstances permit which would indicate a change in ownership.

This principle was first enunciated in *Clow* v. *Woods*, 5 S. & R. 275 (1819), wherein Justice Gibson declared, at p. 279:

> "The law will not and ought not to permit the owner of personal property, to create an interest in another, either by mortgage or absolute sale, and still to continue to be the ostensible owner."

The courts of Pennsylvania have consistently followed this doctrine. In *Enterprise Wall Paper Co.* v. *Rantoul*, 260 Pa. 540, 106 Atl. 198 (1918), a manufacturer of wall paper agreed to sell its entire output to the Enterprise Company for a year. Under the terms of the agreement, all raw material necessary for the manufacturing of wall paper was to be ordered by the manufacturer, billed to Enterprise and paid for by Enterprise. The parties agreed that all raw material purchased by the Enterprise Company under the terms of this agreement should remain the property of the Enterprise Company. There was no change of possession.

The court held that Enterprise did not have title to the raw material as against third persons. Title was held to remain in the manufacturer until a legal delivery was made.

A similar conclusion was reached in *Shipler* v. *New Castle Paper Products Corp.*, 293 Pa. 412, 143 Atl. 182 (1928). The court there held that the mere payment of a selling price for the materials used in manufacturing the finished product is not sufficient to protect the buyer if there has been no

delivery, irrespective of the good faith of the purchaser. We quote from the opinion of the court at page 420:

> "Assuming there was a completed sale, as insisted upon by the appellant, there was no actual delivery of possession. The most that can be urged is that it was a constructive one. Section 26 of the Uniform Sales Act provides: 'Where a person having sold goods continues in possession of the goods, or of negotiable documents of title to the goods, and such retention of possession is fraudulent in fact or is deemed fraudulent under any rule of law, a creditor or creditors of the seller may treat the sale as void.'
>
> "From the early case of Clow v. Wood, 5 S. & R. 275, to the latest declaration in Wendel v. Smith, 291 Pa. 247, it has uniformly been held in this State that there must be an actual or constructive delivery of property sold to protect against attaching or levying creditors of the seller, and, if nothing be shown which indicates an adequate change of possession, the transfer will constitute, as to them, a legal fraud. . . . If he advances the consideration for goods bought without taking possession, he assumes the risk of the integrity and solvency of his vendor when the rights of bona fide purchasers or execution creditors arise, for delivery, actual or constructive, is indispensable to transfer a title that shall be effective against such parties."

It is noteworthy that in the above cases title was predicated upon a stronger fact situation than obtains in the case at bar. In the cases adverted to, the raw materials were billed to and paid for by the vendee; in the case at bar, Mesta paid for the machinery and was reimbursed by the Government.

In *Callahan* v. *Union Trust Co. of Pittsburgh*, 315 Pa. 274, 172 Atl. 684 (1934), a purported sale and bailment lease were held invalid as to third persons. The facts there were as follows: The Western Pennsylvania Amusement Company operated the Regent Theater. In consideration of a loan of money by Callahan, the amusement company executed a bill of sale covering all personalty on the premises

and used in connection with the operation of the theater. After the execution of the bill of sale, Callahan went to the theater and, in the presence of the manager and another employee, checked the items listed in the schedule attached to the bill of sale, in several instances placed his hand upon the articles and declared the property indicated was his and should not be moved from the theater without his consent. He also attached a rider to the insurance policies showing his interest.

On the day following the execution of the bill of sale, Callahan executed a lease agreement with the amusement company, leasing the personal property covered by the bill of sale to the amusement company for a term of eight years. The equipment and fixtures involved in these two transactions remained and were used as theretofore in the theater, which continued to be operated and controlled by the amusement company.

The case came before the Supreme Court of Pennsylvania after an attachment of the property by a judgment creditor of the amusement company. The court held that the bill of sale and the bailment lease executed under these circumstances did not transfer title to Callahan which was valid as against third persons. The action of Callahan in checking the items covered by the bill of sale, placing his hand upon the articles and noting his interest in the insurance policies, was held not to be such an exercise of control as to create a valid sale.

Under the principle there established, it is clear that the action of the contracting officer for the Government in inspecting and accepting the machinery at the Mesta plant, did not constitute either a change of possession or the exercise of control requisite for the transferring of valid title.

The Government has recognized the basic law of Pennsylvania requiring the delivery of possession or change of control to transfer title to personal property, and has complied with it where transfer of title was necessary to afford it security for money advanced. In *Commonwealth Trust*

Co. v. *Reconstruction Finance Corp.*, 120 Fed. (2d) 254 (1941), the Circuit Court of Appeals for the Third Circuit, while recognizing the continuing validity of the doctrine that delivery of possession or assumption of control is indispensable under Pennsylvania law to transfer of title, held that the delivery of possession was adequate where the pig iron in controversy was placed on land leased to the Reconstruction Finance Corporation, where the land was enclosed with a fence and marked with signs of the Reconstruction Finance Corporation and in possession and control of its custodian. We quote from the opinion of the court at page 257:

> "Notwithstanding the absence of any intent to defraud, either actual or constructive, it is the appellant's contention that the pledge was so ineffectually created as to amount to a fraud on third persons, citing and relying upon Clow v. Woods, 5 Serg. & R., Pa., 275, 9 Am. Dec. 346. It was there held that delivery of possession of pledged goods or chattels is legally indispensable to the validity of the pledge so far as the rights of third parties are concerned. Such, we believe, is the law of Pennsylvania and that there has been no deviation from the rule stated in Clow v. Woods. . . ."

How did the Government overcome the force of these decisions? In the light of established Pennsylvania law, what cases did the Government cite in the lower court to buttress its claim of title to the machinery acquired by Mesta? The startling fact is that the Government cited no authorities whatever in support of its claim of title: the Government simply claimed it was the owner of the machinery, Mesta concurred, and the Supreme Court of Pennsylvania ruled that ownership did not matter. Proof of title in the Government was held by the appellate court to be irrelevant and therefore improperly admitted in evidence (R. 102). The appellate court held that, under Pennsylvania taxing statutes, machinery in a manufacturing plant or mill is assessable as real estate against the record owner of the

mill *regardless of ownership.* Under the view of the court, an inquiry into the validity of title claimed by the Government by virtue of its contract with Mesta was unnecessary. We quote from the opinion of the Supreme Court:

> "Furthermore, this private arrangement between the Mesta Company, the owner of the land and buildings and operator of the mill, and the Federal Government, the owner of the machinery, which treats the equipment as personal property and permits the latter to remove it at the termination of the contract, can in no way change the legal effect of the Act of Assembly which specifically designates machinery, under these circumstances, as real estate for tax purposes. (R. 98.)
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> * * *
>
> "We are satisfied that the evidence that the machinery was not owned by Mesta Company was irrelevant and therefore improperly admitted." (R. 102.)

Since the Government asserts that its title to the machinery is of controlling importance in this case, a thorough inquiry into the validity of such title is a primary consideration. Where the law of a State does not permit the owner of personal property to sell it and still continue in possession of it, the courts of the United States will follow the State law: *Dooley* v. *Pease,* 180 U. S. 1260 (1900).

In its brief filed with this court, the Government again cites no authorities in support of its title to the machinery. No such authorities exist. The Pennsylvania decisions are uniform in their requirement of a change of possession or control to perfect a valid transfer of title to personal property. The record in the case at bar is devoid of any evidence of change of possession or control. The only act of ownership relied upon by the Government is the "acceptance" of the machinery by the contracting officer for the Government at the Mesta plant. As was heretofore shown, this act alone does not measure up to the requirements of the Pennsylvania law with respect to the transfer of title to personal property. The private arrangement between the Govern-

ment and Mesta does not change the law where the rights of third persons are concerned.

The Government refers casually to conclusions by the lower court and Supreme Court that title was in the Government. (Brief of the United States, pp. 23, 24.) No such findings were, in fact, made. Although the trial court *assumed* ownership in the Government and based its conclusion that the tax was invalid on the ground that a municipality cannot tax Government-owned property, it made no such finding. The Supreme Court of Pennsylvania specifically ruled that, where machinery becomes a part of a manufacturing plant or mill, it is assessable as the real estate of the record owner of the mill and that the question of the title to the machinery is irrelevant. We quote from the opinion of the Supreme Court (R. 100):

> "To exempt the machinery from taxation would not be in relief of the Government but rather in relief of Mesta Company, and therefore it is clear that the machinery is the proper subject of assessment for tax purposes as the property of the Mesta Company *even though legal title is actually in the Federal Government.*" (Italics supplied.)

From this language, the Government now argues that the Supreme Court recognized that at the time of the assessment the United States owned the machinery and that "legal title to it" was "actually in the Federal Government"—(Brief of the United States, p. 24).

Clearly, the language used by the court arguendo cannot be converted into a "finding" of title in the Government. Nor did counsel for the taxing body concede ownership in the Government (R. 23, 29, 30). It took the position which the Supreme Court approved and adopted, namely, that, *irrespective of title*, machinery which formed an integral part of a mill is assessable as real estate (R. 102). The conclusion is inescapable that this oblique attempt of the Government to preclude an examination into the validity of the

Government's title stems from a recognition of its invalidity.

The Government concedes that Mesta is an independent contractor and not an agent or instrumentality of the Government—doubtless because this court recently so held under similar circumstances.[4] The Government concedes that the fact that it is required to reimburse Mesta for taxes paid does not render the Government immune—doubtless because this court has so held in recent cases involving similar facts.[5] The Government itself has closed the doors to all possible avenues of escape from the tax save that of title and that road leads to Mesta.

This is not the first time the Government has attempted to avoid the imposition of local taxes on the ground that title to the taxed article was in the Government. The same claim was made by the Government in *Alabama* v. *King & Boozer*, 314 U. S. 1 (1941). There the Government sought to avoid the payment of a sales tax imposed upon a supplier of material to a cost-plus contractor working for the Government. The Alabama statute imposed a tax upon the seller, but made it collectible from the purchaser. The Government claimed it was the purchaser within the meaning of the Alabama statute because it had title to the material.

Under the heading, "The Purchases Made through the Cost-Plus Contractor Are Those of the United States," the following argument is made by the Government at page 89 of the Brief filed by it in the United States Supreme Court:

> "TITLE. The contract makes it plain that, from the moment of its purchase, the United States has title to all work and material. Title to the work completed or in the course of construction is in the Government. Upon delivery and inspection, title to all materials, tools, machinery and equipment and supplies vests in the United States."

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[4] *Alabama* v. *King & Boozer*, 314 U. S. 1 (1941); *Curry* v. *United States*, 314 U. S. 14 (1941).

[5] *Alabama* v. *King & Boozer*, supra note 4; *Curry* v. *United States*, supra note 4.

The Supreme Court held that the reservation of title by the Government did not constitute it a purchaser so as to prevent the imposition of the tax upon the cost-plus contractor. We quote from the opinion of Chief Justice Stone, at page 13:

> "*The Government,* to support its thesis that it was the purchaser, *insists that title to the lumber passed to the Government on shipment by the seller,* and points to the very extensive control by the Government over all purchases made by the contractors. It emphasizes the fact that the contract reserves to Government officers the decision of whether to buy and what to buy; that purchases of materials of $500 or over could be made by the contractors only when approved in advance by the contracting officer; that the Government reserved the right to approve the price, to furnish the materials itself, if it so elected; and that in the case of the lumber presently involved, the Government inspected and approved the lumber before shipment. From these circumstances it concludes that the Government was the purchaser." (Italics supplied.)

The contract between the Government and the Dunn Construction Company in that case and the contract between the Government and Mesta in this case are practically identical with respect to the provision for the reservation of title. We quote from the contract between the Government and Dunn Contracting Company at page 51 of the Supreme Court record in *Alabama* v. *King & Boozer:*

> "Article I-3. The title to all work, completed or in the course of construction, shall be in the Government. Likewise, upon delivery at the site of the work or at an approved storage site and upon inspection and acceptance in writing by the Contracting Officer, title to all materials, tools, machinery, equipment and supplies, for which the Contractor shall be entitled to be reimbursed under Article II, shall vest in the Government. These provisions as to title being vested in the Government shall not operate to relieve the contractor from any duties imposed under the terms of this contract."

The contract provision with respect to title in the case at bar is as follows (R. 46):

> "Article I-H—Title. The title to all work under this Title I, completed or in the course of construction, shall be in the Government. Likewise, upon delivery at the site of the work or at an approved storage site and upon inspection and acceptance in writing by the Contracting Officer, title to all materials, tools, machinery, equipment and supplies, for which the Contractor shall be entitled to be reimbursed under this Title I shall vest in the Government. These provisions as to title being vested in the Government shall not operate to relieve the Contractor from any duties imposed under the terms of this contract."

The contracts, moreover, were identical with respect to the provisions for assignability to the Government, making purchases direct instead of through the contractor, the reimbursement of the contractor for the price of all materials purchased and reimbursement for taxes imposed upon the contractor as a result of its contract with the Government. This court held that *King & Boozer,* the supplier of the lumber to the contractor, was subject to the sales tax and that the provisions of the contract did not constitute the Government the purchaser within the meaning of the Alabama statute which imposed a legal obligation on the purchaser to pay the tax.

In that case as in this, the contractor ordered the material, the contractor was billed for the material, the contractor paid for the material, and the Government reimbursed it for the cost. If title did not best in the Government in *Alabama* v. *King & Boozer* so as to constitute it a purchaser of the lumber, how can it be held that the identical contract provisions vest title in the Government as the purchaser of the machinery in the case at bar?

In determining who was the purchaser, this court held that the law of Alabama and its decisions would control. It is submitted that, in determining whether title to the

machinery in question vested in the Government under the provisions of the contract in the case at bar, the law of Pennsylvania and its decisions must control. Since under the law and the decisions of the appellate court in Pennsylvania change of possession and control is necessary to vest title as against third persons, the Government never became a valid purchaser of the machinery and therefore never had title.

Once it is established that the Government never had title to the machinery in question, it follows that the purported "leasing" to Mesta was not a valid bailment. The Government could not become the bailor of machinery it did not own, nor could Mesta become the bailee of property to which it continued to hold legal title. Mesta cannot at the same time occupy the contradictory legal positions of owner and bailee.

The Government's case rests squarely upon its claim of title to the machinery in question. Since title is not in the Government but in the Mesta Machine Company, the Government's case collapses.

The language of the court in *Root* v. *Republic Acceptance Corp.*, 279 Pa. 55, 123 Atl. 350 (1924), is peculiarly apt:

> "Appellant stands upon the proposition that the relation between it and the Averill Company was that of bailor and bailee; failing to sustain this position it is worsted, as except for this relation, it has no standing at all as against the trustee. There can be no bailment if there was no sale; and the sale was void as to creditors."

II. The Reservation of Title Was for the Protection of the Government from Mesta and Not for the Protection of Mesta from the Taxing Authorities

The contract between the Government and Mesta contemplated the payment of all taxes imposed by the State or any political subdivision upon the machinery. *Article I-H*,

which purports to reserve title in the Government, contains the following important qualification (R. 46):

> "These provisions as to title being vested in the Government shall not operate to relieve the Contractor from any duties imposed under the terms of this Contract."

Article I-G(b)—Special Requirements Applicable to Title I (R. 46), which immediately precedes this provision for title, provides that the contractor is required to obey and abide by all applicable laws of the State or political subdivision wherein the work is done.

One of the laws applicable to the contractor is the Assessment Act of the State of Pennsylvania, providing for the assessment of ad valorem taxes on all real estate, including the machinery of manufacturing plants.

Article I-D(g) specifically provides for reimbursement by the Government for money expended by the contractor on account of any State or local taxes imposed on the plant or equipment covered by the contract (R. 43):

> "(g) Payments from his own funds made by the contractor under the Social Security Act, and any applicable State or local taxes, fees, or charges which the Contractor may be required on account of this contract to pay on or for any plant, equipment, process, organization, materials, supplies, or personnel; and, if approved in writing by the Contracting Officer in advance, permit and license fees, and royalties on patents used, including those owned by the Contractor."

Article III-E, in sub-paragraph (b) under Taxes, provides for reimbursement of sales or transaction taxes (R. 53):

> "(b) State, County, and Municipal Taxes.—The contract prices as stated in Article III-D herein do not include any tax imposed by any state, county, or municipality upon the transaction of this purchase of guns. The Government shall not be liable, directly or indirectly, for the payment of any such taxes, except that if the Contractor after using every effort short of

> litigation to procure exemption or refund, as the case may be, should be compelled to pay to any state, county or municipality, any tax upon the transaction of this procurement, an amount equal to the tax so paid shall be paid by the Government on demand of the Contractor, in addition to the prices herein stated."

It would seem, therefore, that the Government fully contemplated the imposition of local taxes against the machinery and the reimbursement of the contractor for payment of such taxes. The conclusion is inescapable that the reservation of title was intended as a measure of protection as against the contractor and not as against third persons or the taxing authorities. However, irrespective of intention, the law is clear that the private arrangement between the Government and Mesta cannot operate to vest title in the Government as against third persons.

III. Machinery Forming an Integral Part of a Mill or Manufactory Is Assessable as Real Estate for Tax Purposes

Under Pennsylvania law, machinery in a manufacturing plant or mill is part of the freehold and assessable as real estate. This has been the consistent position of Pennsylvania courts. We quote from the decision of the court in the early case of *Gray* v. *Holdship*, 17 S. & R. 413 (1828), at page 415:

> "From the adjudged cases on this subject I think we are warranted in saying that everything put into and forming part of a building, or machinery for manufacturing purposes, and essential to the manufactory, is part of the freehold; the wheels of a mill, the stones, and even the bolting cloth, are parts of the mill and of the freehold, and cannot be levied on as personal property. . . ."

In *Patterson* v. *Delaware County*, 70 Pa. 381 (1872), the court held taxable as real estate the machinery of a cotton factory. The statute under which the assessment was made

was the Act of April 28, 1844, P. L. 486, Sec. 32,[6] which section is practically identical with Section 201 of the Act of 1933, P. L. 853, as amended, under which the assessment was made in the instant case.[7]

Nor is the degree of attachment to the freehold of controlling importance. The machinery in the case at bar is very heavy and is installed in concrete foundations specially constructed to accommodate it. Although it is attached by bolts and removable without damage to the building, its severability does not convert it into personalty. We quote from the opinion of the court in *Patterson* v. *Delaware County, supra,* at page 385:

> "If what he denominates *machinery* is to be cast out in the assessment of mills, what is to be included? Simply the bare walls? That would hardly be claimed. But where else could we draw the line? According to the old rule by which it was sought to distinguish between real and personal property—*physical annexation?* That has been found impracticable, no rule at all, and has, therefore, long since been abandoned."

The fallacy inherent in the severability test is succinctly stated in the opinion of Chief Justice Gibson in *Voorhis* v.

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[6] *Sec. 32, Act of April 28, 1844, P. L. 486:* "All real estate, to wit, houses, lots of ground, ground rents, mills and manufactories of all kinds, furnaces, forges, bloomeries, distilleries, sugar-houses, malt-houses, breweries, vineyards, fisheries, ferries, wharves, and all other real estate not exempt by law from taxation, shall be valued and assessed for all state and county purposes."

[7] Sec. 201, Art. 3, *Act of May 22, 1933,* P. L. 853, as amended by the *Act of July 2, 1941,* P. L. 219, Sec. 1, 72 P. S. 5020-S. 201

"Subjects of Taxation enumerated: The following subjects and property shall, as hereinafter provided, be valued and assessed, and subject to taxation for all county, city, borough, town, township, school and poor purposes at the annual rate: (a) All real estate to wit: Houses, lands, lots of ground and ground rents, mills and manufactories of all kinds, furnaces, forges, bloomeries, distilleries, sugar-houses, malt-houses, breweries, tan yards, fisheries, and ferries, wharves and all other real estate not exempt by law from taxation."

Freeman, 2 W. & S. 116. We quote from the opinion of the court:

> "The criterion of physical annexation is too limited in its range and so productive of contradictions, even in regard to fixtures in dwelling houses, to which it was adopted before England had become a manufacturing country, that it will answer for nothing else. The courts will be drawn away from it by its narrowness and want of adaptation to the business and improvements of the age. From the force of habit they have adhered to it after it has ceased to be a guide; for nothing but a passive regard for old notions could have led them to treat machinery as personal property when it was palpably an integrant part of a manufactory or mill, merely because it might be unscrewed or unstrapped, taken to pieces and removed, without injury to the building."

The court there held that all machinery, whether attached or loose, which is necessary to constitute a manufacturing plant must pass as part of the freehold. A similar conclusion as to the machinery in a woolen mill was reached in *Guthrie* v. *Pittsburgh Dry Goods Co.*, 47 Pa. Superior Ct. 384 (1911).

The Government is in error when it asserts, "Moreover it may be noted that the assessment of January, 1942, was not made on the theory that the Government's machinery merely enhanced the value of the lands and buildings concededly owned by Mesta. The machinery was listed as a separate taxable item." (Brief of the United States, Footnote, p. 23.) To the contrary, the assessment was made on the theory that the machinery acquired by Mesta in the performance of the Government's contract enhanced the value of the Mesta plant. While under the practice in Allegheny County the breakdown of land, buildings and machinery is separately shown, the assessment is against the plant as a whole. In this connection, we quote from the pertinent opinion of the court in *Guthrie* v. *Pittsburgh Dry Goods Co.*, supra, where the assessment as in the case at bar was made against a factory and the assessments against the building,

land, improvements and machinery were separately shown (p. 386):

> "The statement shows the assessment of the real estate to stand in this form: 'Factory building, $25,000; four acres, $400; improvement and machinery, $25,000.'
>
> "As we understand it, the 'improvement and machinery' are in the aforesaid 'factory building,' and the 'factory building' is located on the 'four acres.' Therefore, what is enumerated above in the form of three separate items is but a mode of describing a single subject of taxation, by an enumeration of its several constituents—and the aggregate of the valuations placed on these several constituents is, in each of the assessments, the basis to which the fixed rate of taxation for real estate has been applied.
>
> "*The levy is on the aggregate of the valuations.* The rate is the rate appropriate to a real estate tax, and no attempt has been made to levy any other kind of a tax. While the enumeration of the constituents of a single subject of taxation, when looked at from a purely logical and legal standpoint, may not be the best mode of procedure, yet it is a mode that is often pursued in actual practice, and is not violative of any legal right of the taxpayer." (Italics supplied.)

The decision of the Supreme Court of Pennsylvania in the case at bar, that the machinery in question formed a real and permanent part of the mill of the Mesta Company and was therefore subject to assessment as real estate, is in conformity with the established law of Pennsylvania.

IV. Reservation of Title by the Government Cannot Change the Legal Effect of an Assessment Statute Which Designates Machinery in Plants and Mills as Real Estate

It is the position of the Government in this case that the reservation of title by it to the machinery installed in the Mesta plant prevents the inclusion of this machinery in the assessment of the Mesta plant. The fundamental ques-

tion before this court is whether the private arrangement between Mesta, the owner of the land and buildings and operator of the mill, and the Federal Government, the purported owner of the machinery, can change the legal effect of a taxing statute which provides for the taxation of machinery in plants as real estate.

The decisions in the Commonwealth of Pennsylvania are uniform that private arrangements between the owner of the land and the owner of machinery cannot change the character of the property for tax purposes. In *Guthrie* v. *Pittsburgh Dry Goods Co.*, 47 Pa. Superior Ct. 384 (1911), the court held that the owner of land and buildings cannot deny his liability under a tax statute because the machinery which composed a permanent and essential part of the manufactory was owned by a tenant who had a right to remove it at the end of his lease. We quote from the opinion of the court (p. 401):

> "Does the private arrangement between the tenant and the landlord which permitted the former to remove the machinery at the end of the term change the character of the property as affected by the taxing statutes? We think not. . . . If the machinery is not to be included there is no manufactory to be taxed and the land and building would be liable not as a factory but as 'other real estate' as provided in the same section of the statute. The property is either a manufactory or it is not. If a manufactory it is clearly subject to taxation under the specification of that class of property."

A similar conclusion was reached in *Bemis v. Shipe*, 26 Pa. Superior Ct. 42 (1904), where the court clearly distinguished between the effect of a private arrangement between the parties and the effect as to taxing authorities. There the court said:

> "It may be admitted that, as between the owners of the land and the owners of the mill, the latter may be regarded and treated by them as personal property, and yet it by no means follows that in contemplation of law for other purposes it is not real estate. Without

the express permission of the owners of the land to remove the buildings prior to a certain date, if nothing whatever had been said in regard to them in the original lease, they would doubtless belong to the owners of the land at the expiration of the lease, as being part of the real estate, but such permission does not change the physical character of the property, nor does it in any way change its legal status, except as between the parties themselves and those claiming under them and as to the legal machinery through which the title of the lessees may be transferred to creditors or others who desire to secure their rights."

A clear exposition of the law is contained in *Pennsylvania Stave Company's Appeal,* 236 Pa. 97 (1912), where the Supreme Court held that a manufacturing plant consisting of a sawmill, houses, shops, sheds and barn, is taxable as real estate, although the structures stood upon land leased for a term of years with a right in the lessee to remove the buildings and machinery at the end of the term. We quote from the opinion of the court at page 101:

"It will be noticed that under the general term 'real estate' the act specifically names many kinds of structures to be included as proper subjects of taxation. Houses, mills and manufactories of all kinds are included in the enumeration with the evident intention of making them subjects of taxation as real estate. There is no suggestion that the taxation of houses, mills and factories is made to depend upon the kind or character of the estate the owner may have in the land upon which the buildings are located. The taxing statutes look to the nature of the structure, whether it be permanent or not, rather than to the technical legal distinctions as to what constitutes real estate. If it had been otherwise intended it would not have been necessary to designate the different kinds of improvements which should be subject to taxation as real estate.

"The legislature had the power to say what kinds of property should be taxed as real estate and it exercised this power in the Acts of 1834 and 1844. The property involved in this proceeding comes within the express

provisions of these statutes, and it would be sticking in the bark to hold that this valuable estate should be exempt from taxation because the stave company was not the owner of the fee in the land demised to it for a term of years. In this connection it should not be overlooked that the stave company is the owner of the sawmill, houses, sheds, shops and barn, with the right to remove the same at the expiration of the term, and that during the occupancy of the land, it has an estate in the demised premises. In no proper legal sense can the buildings in question here be considered trade fixtures, nor can they be treated as personal property under our taxing statutes."

In Pennsylvania, the registered owner of land is liable for taxes assessed against the land during the time of such registration whether in fact an owner or not. We quote from the leading case of *Pennsylvania Company* v. *Bergson*, 307 Pa. 44, 159 Atl. 32 (1932), at page 51:

> "When a deed or other conveyance is duly recorded and registered in the name of a given person, he, as the registered title holder, is regarded as the 'owner' for purposes of assessment and taxation, and is personally liable for taxes levied on the property. This liability attaches because he holds himself out to the world through public records as owner by being registered and recorded as owner. . . . These authorities may, for the purpose of taxation, treat individuals in their several relations as they appear on the designated indices or the public records that are provided."

The Supreme Court of Pennsylvania has held in this case that the Mesta Machine Company could not avoid the imposition of the tax by its private arrangement with the Federal Government. The majority of the court held as follows: "Nor can the Mesta Company, by its private arrangement acknowledging that the Federal Government has title to the machinery which is an integral part of the mill of the company, evade the right of the County to assess the company as the owner of the mill erected upon land title to

which is in its name upon the public records. The mill of the company was taxable under the statute as real estate, and this necessarily included the machinery essential to the existence and operation of that manufactory." (R. 98.)

To hold otherwise would result in Mesta's using the machinery for Government work and for private work—this is specifically permitted under Article II-D-1 (R. 49)—tax free. It is submitted moreover that leasehold interests on land are taxable even when the fee or reversion is tax exempt. Mesta's interest in the machinery is taxable whether its interest be that of an owner or lessee.

In *Franklin County* v. *McLean*, 93 Pa. Superior Ct. 165 (1928), the Commonwealth of Pennsylvania had leased ground as a site for a temporary building for a term of ten years, with the right in the lessee upon the termination of the lease to remove the building placed thereon by him. The local assessors assessed as real estate the property of the tenant for the imposition of an ad valorem tax thereon. The tenant moved to strike off the assessment, claiming that, since the fee was in the Commonwealth, the property was tax exempt under the Constitution and the interest of the lessee was therefore not taxable.

The court held that the fact that the Commonwealth was the owner of the land did not prevent the taxing authorities from assessing as real estate the interest of the tenant which, under Pennsylvania statutes, was assessable as real estate. We quote from the opinion of the court at page 172:

> "The State's sovereignty in the forest reserve lands so guards them that its title thereto cannot be divested by a tax sale by the local tax gatherer. But in our view, the sovereignty does not prohibit the taxation of an estate of a lessee in a part thereof, which falls within the express provisions of the Acts of 1834 and 1844."

As heretofore pointed out, the Acts of 1834 and 1844 are practically identical with the instant act, which would make the reasoning of the court as persuasive today as it was then.

The Government takes the position in its Brief (Brief of the United States, p. 27) that under Pennsylvania decisions property owned by a State or its political subdivisions is not taxable even though revenue is derived from the leasing of such property. In support of this proposition, the Government cites the case of *Dornan* v. *Philadelphia Housing Authority*, 331 Pa. 209 (1938). In that case the Supreme Court of Pennsylvania held that the fact that revenue is derived from housing projects does not preclude the existence of a public use. The exemption of the property from taxation was clearly predicated upon its being devoted to a public use.

Dornan v. *Philadelphia Housing Authority* is clearly distinguishable on its facts from the instant case. There are several cases in Pennsylvania decided after the *Dornan* Case which specifically rule that a political subdivision is not tax exempt where its property is leased for private purposes even though the receipts are thereafter used for public purposes. The Government appears to have overlooked the more recent case of *Pittsburgh School District* v. *Allegheny County*, 347 Pa. 101 (1943), wherein the Supreme Court of Pennsylvania held that a county can levy a real property tax upon land owned by a school district and leased to a private person for a commercial enterprise even though the income from the property is used for school purposes. Similar conclusions were reached in *Kittanning Borough* v. *Armstrong County*, 347 Pa. 110 (1943) and in *Easton* v. *Koch*, 152 Pa. Superior Ct. 327 (1943), Advance Sheets.

It is urged that where the obvious intent of an agreement is not to effect a bona fide transfer of ownership but is for the purpose of affecting the tax status, the courts will look into the realities of the transaction. While parties may change the ownership of property by agreement, such agreements are binding only as between the parties and have no binding effect upon third persons or taxing authorities. An assessor of real estate is not required to look be-

yond the manifest character of a building in order to ascertain its taxable status. If the purpose of the reservation of title in the instant case was to avoid the payment of local taxes by the contractor, it has no effect whatsoever as against the taxing authority. Clearly, such a tax avoidance plan by private persons would be summarily disposed of by the court; a tax avoidance plan entered into by the Government is equally assailable.

It is respectfully submitted that, where the Government subsidizes the purchase of machinery by a contractor and consents to its installation in a plant to which the contractor has title, the machinery becomes a part of the manufacturing plant and subject to all local taxes applicable to such plant. The doctrine of the immunity of Federal property from local taxation cannot be invoked in such circumstances.

The Government takes the position that even if the Assessment Statutes of Pennsylvania authorize assessment of this machinery as part of the real estate of Mesta were the machinery owned by a private person, the same conclusion cannot be reached where the machinery is owned by the United States. It becomes necessary therefore to examine the doctrine of Federal immunity and to determine whether the assessment in the case at bar was valid under the Constitution of the United States.

V. The Development of the Doctrine of the Immunity of Federal and State Governments from Taxation

When a legal principle is announced in terms of sweeping absolutes, it becomes so imbedded in the body of the law that it may remain unchallenged for generations. The resounding phrase of Chief Justice Marshall in 1818, that "the power to tax involves the power to destroy," was strengthened by mere repetition over the years. The doctrine of Federal immunity from State taxation was extended to include a reciprocal immunity of State instrumentalities from Federal taxation. A century elapsed before the validity of the broad doctrine of implied Federal

immunity established in *McCulloch* v. *Maryland* was re-examined and questioned.

State and local governments experienced limitations on the doctrine of immunity from Federal taxation long before the Federal doctrine of immunity was limited. The expansion of State activities was early and rapid. State and local governments entered fields of activity and exercised functions that were originally performed solely by private enterprise. If such instrumentalities were construed to be tax exempt, the taxing power of the Federal Government would have been greatly curtailed. The courts met the problem by curtailing the implied doctrine of State immunity.

In *South Carolina* v. *United States*, 199 U. S. 437 (1905), the exemption of State instrumentalities from Federal taxation was specifically limited to instrumentalities of a strictly governmental character and were held not to extend to instrumentalities used by the State in performing a proprietary function. The sale of liquor by State operated liquor stores was held by the Supreme Court not to meet the "essential governmental function" test and was therefore declared taxable by the Federal Government. The doctrine of State immunity established in *Collector* v. *Day*, 11 Wall 113, was drastically restricted by the adoption of the "essential governmental function" test.

In *Helvering* v. *Gerhardt*, 304 U. S. 405 (1938), an additional test was applied to State instrumentalities,—the "economic burden" test. The salary of a construction engineer of the Port of New York Authority, created under an Act of Congress by an agreement between the States of New York and New Jersey, was held subject to Federal taxation. This court held that, where the burden of the tax falls directly on the taxpayer and only indirectly on the State instrumentality, there is no immunity from taxation. We quote from Mr. Justice Stone at page 424:

> "We decide only that the present tax neither precludes nor threatens unreasonably to obstruct any function essential to the continued existence of the state

government. So much of the burden of the tax laid upon respondent's income as may reach the state is but a necessary incident to the co-existence within the same organized government of the two taxing sovereigns, and hence is a burden the existence of which the Constitution presupposes. The immunity, if allowed, would impose to an inadmissible extent a restriction upon the taxing power which the Constitution has granted to the federal government."

Mr. Justice Black pointed out, in a concurring opinion, the confusion resulting from the application of the "essential governmental function" test and the necessity for restricting the doctrine evolved in *Collector* v. *Day*.

South Carolina v. *United States* and *Helvering* v. *Gerhardt* clearly evidenced the refusal of the Supreme Court as constituted in 1938 to extend the doctrine of State immunity or to give it the broad interpretation which had been given the doctrine of Federal immunity. The imposition of the "essential governmental function" test and the "economic burden" test operated inevitably to emasculate the doctrine of immunity as applied to the States.

VI. The Narrowing of the Doctrine of Federal Immunity from Taxation

The broad doctrine of Federal immunity as originally enunciated was predicated upon an implied prohibition in the Constitution against the States imposing any tax or burden, however indirect, upon the sovereign power of the Federal Government. In the early application of this doctrine, the immunity of the Federal Government was extended to all persons who did business with the Federal Government.

Thus, in *Telegraph Co.* v. *Texas*, 105 U. S. 460, 26 L. ed. 1067 (1882), the imposition of a State tax on messages sent out by the telegraph company doing business in the State was held invalid as to Government messages. As to such messages, the court held that the imposition of the tax on

the telegraph company would in effect result in taxing an agency of the Federal Government. Under the decision in this case and companion cases, contractors supplying the Federal Government or any of its instrumentalities with gasoline, lumber or any other materials or services, become Governmental agencies as regards the immunity of their government business from State taxation.

It is significant that the essential governmental function test applying to the State and its instrumentalities was never applied to the Federal Government. The Federal Government is one of delegated powers in the exercise of which Congress is supreme. The courts have therefore held that every agency which Congress can constitutionally create is a Governmental agency performing a governmental function.

As the Federal Government began to expand its activities to an unprecedented extent, a broad construction of the immunity doctrine would have removed from local taxation independent contractors supplying the Federal Government or its instrumentalities with commodities or services. The courts at that point began to limit the broad doctrine of Federal immunity. Thus, in *Baltimore Shipbuilding & Dry Dock Co.* v. *Baltimore*, 195 U. S. 375 (1904), the court held:

> "It seems to us extravagant to say that an independent private corporation for gain, created by a State, is exempt from State taxation either in its corporate person or in its property because it is employed by the United States, even if the work for which it is employed is important and takes much of its time."

Similarly, in *Fidelity & Deposit Co.* v. *Pennsylvania*, 240 U. S. 319 (1916), the court held:

> "But mere contracts between private corporations and the United States do not necessarily render the former essential governmental agencies and confer freedom from State control."

In *Panhandle Oil Co.* v. *Mississippi ex rel. Knox*, 277 U. S. 218 (1928), a gasoline tax on dealers imposed by the State

of Mississippi was held invalid where the gasoline was sold to the Government. The court held that the necessary effect of the tax was to burden the United States in the exercise of its functions. A similar conclusion was reached in *Graves* v. *Texas*, 298 U. S. 393 (1936), where the State of Alabama sought to collect taxes imposed on dealers selling gasoline directly to the United States.

In the *Panhandle* Case, the doctrine of Federal immunity was re-examined and challenged by the dissenting opinion of Justice Holmes, concurred in by Justice Stone. The case marks a turning-point in judicial thinking on the subject of Federal immunity.

The gradual limitation of the doctrine of Federal immunity was continued in *Trinityfarm Construction Co.* v. *Grosjean*, 291 U. S. 466 (1934), in which the State of Louisiana attempted to collect a tax on gasoline of the contractor, used to supply power for machinery used in the construction of levees by the contractor for the Federal Government. The Supreme Court held the tax valid, declaring there was no difference for taxation purposes between machinery which was admittedly taxable and the gasoline. The tax on the gasoline was declared to create a remote and not direct burden upon the Federal Government.

In *James* v. *Dravo Contracting Co.*, 302 U. S. 134 (1937), this court held that the burden of a State tax on the gross receipts of a construction company doing Government work imposed too indefinite and remote a burden on the Federal Government to be held invalid.

It is noteworthy that Justice Holmes, in filing a dissenting opinion (concurred in by Justice Brandeis and Justice Stone), in *Panhandle Oil Co.* v. *Miss. ex rel. Knox, supra*, was of the opinion that a sales tax imposed upon the Federal Government itself would be valid. We quote from the dissenting opinion of Justice Holmes at page 224:

> "To come down more closely to the question before us, when the Government comes into a State to pur-

chase I do not perceive why it should be entitled to stand differently from any other purchaser. It avails itself of the machinery furnished by the State and I do not see why it should not contribute in the same proportion that every other purchaser contributes for the privileges that it uses. It has no better or other right to use them than anyone else. The cost of maintaining the State that makes the business possible is just as necesary an element in the cost of production as labor or coal."

The narrowing doctrine of immunity established by recent decisions of this court would indicate that a nondiscriminatory sales tax imposed upon the Federal Government would be upheld even where the purchase was made directly by the Government and not by an independent contractor as in *James* v. *Dravo Contracting Co.*, supra.

The doctrine that the Federal Government could not be burdened in any way was departed from, and a new rule that only a direct burden could confer immunity, was established in *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466 (1939), where this court held that the State of New York could tax the income of employees of the Home Owners' Loan Corporation, a Federal instrumentality.

Prior to this decision, the Supreme Court had always taken the view that the immunity of a Federal instrumentality had to be waived by Congress in order to subject an instrumentality to a State tax, but *Graves* v. *New York ex rel. O'Keefe* adopted the view that silence on the subject of immunity by Congress did not imply immunity. The test of immunity when Congress was silent was held to be the nature and effect of the burden placed upon the Federal Government by the tax in question. The court held that the burden on the government of a nondiscriminatory income tax applied to the salary of the employee of the government or its instrumentality is the same whether a State or national government is concerned. The court departed completely from the old rule that the Federal Gov-

ernment could not be burdened in any way, and took the position that certain burdens are presupposed by the Constitution and if the burden were not direct, no immunity could be claimed.

The two cases from other jurisdictions, namely, *Andrews* v. *Auditor*, 69 Va. (28 Grat.) 115 (1877), and *People ex rel. Donner-Union Coke Corp.* v. *Burke*, 204 App. Div. 557, 198 N. Y. S. 601 (1923), relied upon by the Government are cases which were decided before the adoption by this court of a narrow construction of the immunity doctrine. Their importance is historical rather than persuasive, in the light of present judicial thinking.

In the recent case of *Alabama* v. *King & Boozer*, 314 U. S. 1 (1941), this court held that the right of the Federal Government to be free from taxation by the States does not mean that the Federal Government is relieved from paying the added costs which are attributable to taxation of those who furnish supplies to the Government and have been granted no immunity by Congress.

Dunn Construction Company, a contractor, constructing an Army camp for the Government under a cost-plus-fixed-fee contract, ordered and received lumber from King & Boozer, lumber dealers. The State of Alabama imposed a sales tax on King & Boozer by reason of this sale. The seller resisted on the ground that the sale was for Government work and therefore nontaxable.

The Alabama statute imposes a tax on the seller, but makes it the duty of the seller to add to the sales price and collect from the purchaser the amount due on account of said tax. The seller is required to pay the tax when actually collected from the purchaser.

The Government intervened in the case and claimed that King & Boozer, the supplier, was exempt from the payment of the tax. The Government's position was twofold: (1) Under the provisions of the contract, title to the lumber became vested in the Government upon delivery and ac-

ceptance at the site by its Contracting Officer; hence the Government was the "purchaser" upon whom the tax was imposed by the Alabama statute. (2) The contractor was acting as an instrumentality of the Government in the procurement of material required for the performance of the Government's function, and the sale by King & Boozer to a Government instrumentality was consequently tax exempt.

This court held that King & Boozer, the supplier of the lumber to the contractor, was subject to the sales tax. The court held that the contractor was an independent contractor and not such an instrumentality of the Government as to immunize it from a sales tax. Under Alabama decisions, the provisions of the taxing statute were held to impose a legal obligation on the purchaser to pay the tax. In the opinion of this court, the purchaser was the person who ordered and paid for the goods and on whose credit the sale was made. The contractor purchased the goods in its own name and on its own credit. The court held that, while the Government could have elected to furnish the lumber, the Government had not done so and was only required under its contract to reimburse the contractor.

The contract between the Government and Dunn Construction Company in *Alabama* v. *King & Boozer* and the contract between the Government and Mesta contain the following identical provisions:

1. Title vests in the Government upon inspection and acceptance of the materials by the contracting officer of the Government at the site of the work;
2. Contracts entered into by the contractor are to be assignable to the Government;
3. The Government reserves the right to make the purchases direct instead of through the contractor;
4. The contractor is required to make all contracts in its own name and not to bind the Government;

5. The Government is to reimburse the contractor for all materials purchased;

6. All taxes which the contractor is required to pay as a result of its contract with the Government are to be reimbursed by the Government.

The Government has strenuously attempted to distinguish the facts in the instant case from those obtaining in *Alabama* v. *King & Boozer* so as to avoid the principles there established. It is submitted the distinctions sought to be made are distinctions without differences. While the Alabama case involved a sales tax and the instant case a tax on the *res*, the applicable principles are the same.

The Government's position in the case at bar is no stronger than its position in *Alabama* v. *King & Boozer*. In both cases, the contractor was operating independently[8] and not as an agent or instrumentality of the Government. In both cases, title was reserved in the Government to all material and equipment acquired by the contractor, the material accepted by the contracting officer for the Government at the contractor's plant without change of possession or control. In both cases, the impact of the economic burden of the tax is passed directly and exclusively to the Government, under the specific provisions in the contract requiring reimbursement by it for all taxes paid by the contractor as a result of the contract with the Government. In both cases, the incidence of the tax falls upon the contractor and not upon the Government.

It is noteworthy that in *Alabama* v. *King & Boozer* this court tacitly jettisons the "economic burden" test and establishes a new test for determining Federal immunity—the "legal incidence" test. In conformity with the recently

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[8] *Article I-A* specifically provides that Mesta shall act as an independent contractor and not as an agent of the Government (R. 41): "The Contractor shall as an independent contractor and not as an agent of the Government . . . on a cost-plus-a-fixed-fee basis . . ."

established trend of stringently restricting the scope of the doctrine of the implied immunity of the Federal Government from taxation, the court looks to the formal identity of the taxpayer. Where the legal incidence of a tax falls upon a contractor and not on the Government, no immunity is established even though the direct effect of the tax is to increase the cost to the Government. The identity of the taxpayer upon whom the tax is imposed is of controlling importance under the "legal incidence" test.

In a final effort to avoid the imposition of the ad valorem tax here involved, the Government urges that the legal incidence of the tax falls upon the Government and not upon Mesta. The purpose of this argument is patently to bring the instant case within the preview of the recent decisions of this court which make the legal incidence of a tax of controlling importance.

VII. The Legal Incidence of the Tax Falls Upon the Contractor, Not the Government

Under Pennsylvania taxing statutes, either the real or the record owner may be assessed by the taxing authorities. Where the record owner is assessed, he has a right under Pennsylvania decisions to recovery of the tax from the real owner.[9] The right of recovery, the Government argues, places the "legal incidence" of the tax upon the real and not the record owner. Since the "real" owner of the machinery, the Government, is immune from paying local taxes, Mesta does not have such right of recovery aside from contract. The Government therefore concludes that a municipality cannot elect to tax a record owner where it could not tax the real owner in the first instance because of constitutional immunity and where the record owner has no right under the Constitution to recover from the real owner.

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[9] *Pennsylvania Co.* v. *Bergson*, 307 Pa. 44 (1932);
N. Phila. Tr. Co. v. *Heinel Bros., Inc.*, 315 Pa. 385 (1934).

The Government in its brief filed with this court (p. 29) states its argument in the following manner:

> "If the court purports to give Mesta such a remedy (of reimbursement), it is evident at once that the scheme of the State law is to place the legal incidence of the tax on the Government. But if, because Mesta deals with the United States, the State law fails to give a remedy of reimbursement, which is available to all others in their similar dealings with private individuals, there is a patent discrimination solely because Mesta does business with the Federal Government."

This strained reasoning is predicated upon a basic fallacy, namely, that the tax is imposed upon the machinery. In point of fact, there is no tax imposed upon machinery by Pennsylvania taxing statutes. Machinery which does not form a part of a mill or manufactory is not taxable at all. Nor is machinery which does form a part of a mill or a manufactory taxable *qua* machinery: it simply increases the taxable value of the mill or manufactory as real estate. Since the Government is not the owner or operator of the mill or manufactory, the taxing authorities could not have elected to tax the Government as the real owner of the mill; Mesta alone could be assessed, for Mesta alone owns and operates a mill or manufactory which is subject to an ad valorem tax. It is therefore clear that the legal incidence of the tax falls squarely upon Mesta, the owner of the mill.

It is difficult to perceive the force of the Government's argument. The right or lack of right of reimbursement does not change the incidence of the tax—its legal incidence is still upon Mesta, the owner of the mill, and not upon the Government. Mesta's right of reimbursement arises from the voluntary agreement of the Government under the contract which it elected to enter into with Mesta.

A similar argument was made by the Government in *Alabama* v. *King & Boozer, supra,* where the Government claimed that the legal incidence of the tax fell upon the

Government, not the contractor. We quote from the opinion of Mr. Chief Justice Stone in that case, at page 9:

> "The contention of the Government is that the tax is invalid because it is laid in such manner that, in the circumstances of this case, *its legal incidence is on the Government rather than on the contractors,* who ordered the lumber and paid for it but who, as the Government insists, have so acted for the Government as to place it in the rôle of a purchaser of the lumber. The argument runs: the Government was a purchaser of the lumber, and but for its immunity from suit and from taxation, the state applying its taxing statute could demand the tax from the Government just as from a private individual who had employed a contractor to do construction work upon a like cost-plus contract." (Italics supplied.)

The contention of the Government did not prevail in *Alabama* v. *King & Boozer* and cannot logically prevail in the case at bar.

In *Penn Dairies* v. *Milk Control Commission*, 318 U. S. 261 (1943), this court held that State price control regulations invoked against a contractor selling milk to the United States was not in violation of the immunity doctrine. We quote from the opinion of Chief Justice Stone:

> "The trend of our decisions is not to extend governmental immunity from state taxation and regulation beyond the national government itself and governmental functions performed by its officers and agents. We have recognized that the Constitution presupposes the continued existence of the states functioning in coördination with the national government, with authority in the states to lay taxes and to regulate their internal affairs and policy. . . ."

In *Mayo* v. *United States*, 319 U. S. 441 (1943), the court again points out the difference between exations on private contractors working for the Government and exactions imposed upon the Federal Government itself. There the

State of Florida attempted to impose an inspection fee upon fertilizer which the United States owned and was distributing within the State pursuant to the provisions of the Soil Conservation and Domestic Allotment Act. We quote from the opinion of Mr. Justice Reed in declaring the tax invalid (p. 447):

> "These inspection fees are laid directly upon the United States. They are money exactions the payment of which, if they are enforceable, would be required before executing a function of government. Such a requirement is prohibited by the supremacy clause. We are not dealing, as in Graves v. New York ex rel. O'Keefe, supra, with a tax upon the salary of an employee, or as in Alabama v. King & Boozer, 314 U. S. 1, with a tax upon the purchases of a supplier, or as in Penn Dairies v. Milk Control Commission, 218 U. S. 261, with price control exercised over a contractor with the United States. In these cases the exactions directly affected persons who were acting for themselves and not for the United States. These fees are like a tax upon the right to carry on the business of the Post Office or upon the privilege of selling United States bonds through Federal officials. Admittedly, the state inspection service is to protect consumers from fraud, but, in carrying out such protection, the Federal function must be left free. This freedom is inherent in sovereignty."

It may be that "the power to tax involves the power to destroy" if unlimited (though properly limited to nondiscriminatory taxes it involves no such threat), but the converse is equally true and we submit that "the power to claim tax immunity involves the power to destroy" local government if the power of the United States to create such immunity for private industry is unlimited. There is no express constitutional exemption in the Federal Constitution and the same salutary judicial principles which prevent taxation from becoming oppressive to government

likewise should prevent tax exemption from becoming oppressive to government. When it is asserted by the government that the "right" to tax exemption extends to private industry because of private contracts with private persons the salutary principles upon which tax immunity was originally predicated ceases to have any application unless it be the converse application suggested above. There is no threat here to destroy federal government. There is a threat here to seriously cripple local government.

It is the purpose of this brief to place emphasis upon the general principles of tax exemption applicable to tax problems affecting the country as a whole. Such general principles are pertinent to the present case. Since the case originated in Pennsylvania those principles must be applied to the Pennsylvania statutes and judicial decisions. We believe however that this case can and should be decided upon fundamental principles of tax liability and exemption and these principles we shall endeavor to develop.

In general we shall present the proposition that tax immunity is not absolute but is coextensive with the threat to sovereignty and ceases when the threat ceases, that there is no threat in this field of taxation and indeed there is no burden at all except that created by the contracts of the parties, and that in ascertaining the existence of a threat to sovereignity we are not concerned with nominal title or ownership nor with the form or framework of transactions ingeniously devised by over-zealous public servants but are concerned only with substance and realities.

CONCLUSION

In conclusion, it is respectfully submitted that no unbending test has been established to determine when the immunity doctrine shall be invoked. Unlike Procrustes, who placed his victims upon a rack, stretching them if too short, lopping them off if too long, the present tendency of this Court is to set no rigid formula for the application of the immunity doctrine but to inquire in each instance into the realities of the situation. Where the tax is nondiscriminatory and there is no genuine interference with the functioning of the Federal Government and the incidence of the tax falls upon private interests, this Court has refused to invalidate the imposition of local taxes.

No tax is imposed in Pennsylvania upon machinery as such. The value of machinery forming an integral part of a mill is included in the assessment of the mill for purposes of ad valorem taxation regardless of its severability and irrespective of its ownership. Mesta alone is the owner and operator of a mill which is subject to assessment for real estate purposes. Moreover Mesta, not the Government, is the owner of the machinery; Mesta, not the Government, is the record and the real taxpayer.

The Government points to the importance of the question presented by the case at bar because of the billions of dollars' worth of equipment forming integral parts of plants of cost-plus contractors throughout the country which will be subject to local taxation if the decision of the Supreme Court of Pennsylvania is upheld. Indubitably, the validation of assessments of this character will measurably increase the cost of waging the war, but the impact of this cost will be diffused throughout the country as a whole. On the other hand, a contrary ruling would throw a back-breaking burden upon local governments where war plants are located.

It is earnestly submitted that there is neither authority nor sound reason for holding that the assessments made

against the Mesta mill are invalid. The involved and circuitous reasoning by which the Government emerges as the owner of the machinery and the real taxpayer is a defense-in-depth maneuver that is readily penetrated. The decision of the Supreme Court of Pennsylvania should be affirmed.

This brief is respectfully submitted on behalf of the member cities of The National Institute of Municipal Law Officers.

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SUPREME COURT OF THE UNITED STATES.

No. 417.—October Term, 1943.

The United States of America and Mesta Machine Company, Appellants, *vs.* County of Allegheny, Pennsylvania. } Appeal from the Supreme Court of the State of Pennsylvania.

[May 1, 1944.]

Mr. Justice Jackson delivered the opinion of the Court.

We are called upon to solve another of the recurring conflicts between the power to tax and the right to be free from taxation which are inevitable where two governments function at the same time and in the same territory. In arguing the case of *McCulloch* v. *Maryland*, Luther Martin, Attorney General of Maryland, himself a member of the Constitutional Convention, said, "The whole of this subject of taxation is full of difficulties, which the Convention found it impossible to solve, in a manner entirely satisfactory. The first attempt was to divide the subjects of taxation between the State and the national government. This being found impracticable, or inconvenient, the State governments surrendered altogether their right to tax imports and exports, and tonnage; giving the authority to tax all other subjects to Congress, but reserving to the States a concurrent right to tax the same subjects to an unlimited extent. This was one of the anomalies of the government, the evils of which must be endured, or mitigated by discretion and mutual forbearance." *McCulloch* v. *Maryland*, 4 Wheat. 316, 376. Where discretion and forbearance have failed it often has fallen to this Court to determine specific cases for which the Convention was unable to agree upon a general rule. Looking backward it is easy to see that the line between the taxable and the immune has been drawn by an unsteady hand.

But since 1819, when Chief Justice Marshall in the *McCulloch* case expounded the principle that properties, functions, and instrumentalities of the Federated Government are immune from

taxation by its constituent parts, this Court never has departed from that basic doctrine or wavered in its application. In the course of time it held that even without explicit congressional action immunities had become communicated to the income or property or transactions of others because they in some manner dealt with or acted for the Government:[1] In recent years this Court has curtailed sharply the doctrine of implied delegated immunity.[2] But unshaken, rarely questioned, and indeed not questioned in this case, is the principle that possessions, institutions, and activities of the Federal Government itself in the absence of express congressional consent are not subject to any form of state taxation. The real controversy here is whether, especially in view of recent decisions, taxing authorities of the Commonwealth of Pennsylvania have infringed this admitted immunity.

Mesta Machine Company, an appellant with the United States, exists as a corporation under the laws of Pennsylvania and has a manufacturing plant in the County of Allegheny, of that Commonwealth, the County being appellee herein. It is engaged in the manufacture of heavy machinery. In October 1940, the War Department desired to produce a quantity of large field guns. It could have assembled an organization, created a government-owned corporation, and erected a plant which would have been wholly tax immune. *Clallam County* v. *United States*, 263 U. S. 341. But for reasons of time and policy it chose to utilize a going concern under private management and ownership. Mesta's plant was not equipped for the manufacture of ordnance. It was agreed that certain additional equipment specially required for the work should be furnished at Government cost and should remain the property of the United States.

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[1] See Dobbins v. Commissioners, 16 Pet. 435; Collector v. Day, 11 Wall. 113; New York *ex rel.* Rogers v. Graves, 299 U. S. 401; Osborn v. Bank, 9 Wheat. 738; Owensboro National Bank v. Owensboro, 173 U. S. 664; Choctaw & Gulf R. Co. v. Harrison, 235 U. S. 292; Gillespie v. Oklahoma, 257 U. S. 501; Jaybird Mining Co. v. Weir, 271 U. S. 609; Federal Land Bank v. Crosland, 261 U. S. 374; Telegraph Co. v. Texas, 105 U. S. 460; Leloup v. Port of Mobile, 127 U. S. 640; Indian Motocycle Co. v. United States, 283 U. S. 570; Panhandle Oil Co. v. Mississippi *ex rel.* Knox, 277 U. S. 218; Graves v. Texas Co., 298 U. S. 393.

[2] See Alabama v. King & Boozer, 314 U. S. 1; Graves v. New York *ex rel.* O'Keefe, 306 U. S. 466; James v. Dravo Contracting Co., 302 U. S. 134; Helvering v. Gerhardt, 304 U. S. 405; Helvering v. Mountain Producers Corp., 303 U. S. 376.

The basic arrangement between Mesta and the Government was provided for by three separate titles of a single contract, made in October 1940. A title was devoted to each feature of the arrangement, being generally: procurement of Government-owned equipment at Government cost; lease of such equipment by the Government to Mesta; and Mesta's undertaking to make and deliver the guns at a fixed price each. In February 1941 a supplemental contract was made.

Under the first title of the contract machinery was to be procured in three possible ways: Mesta, as an independent contractor and not as agent of the Government, could purchase it; Mesta could manufacture it; or the Government at its option could furnish any part of it. In carrying out the agreement Mesta manufactured one machine, the Government furnished eight gun-boring lathes and two rifling machines from its Watervliet Arsenal, and the rest Mesta purchased from other machine-tool manufacturers. The machinery bought or built by Mesta was inspected and accepted on behalf of the United States, which thereupon compensated Mesta as agreed. The contract provided that title to all such property should vest in the Government upon delivery at the site of work and inspection and acceptance.

By the second title of the contract the Government leased this equipment to Mesta for the period during which guns are manufactured by it under this contract or later supplements. As rental Mesta agreed to pay the sum of one dollar. Mesta was permitted to use the equipment "for the purpose of expediting the manufacture of guns" and for no other, without consent, except that such machinery as was "purchased or furnished to supplement its existing facilities" might be used "for general purposes." Liability of Mesta for loss, damage, or destruction of equipment was "that of a bailee under a mutual benefit bailment." Mesta could not remove any of it without permission, and at all times it was accessible to Government inspection. On termination of the gun-supply contract, unless a stand-by contract was made, Mesta agreed to remove and ship the equipment according to Government directions, in good condition subject to fair wear and tear and depreciation.

The leasing title of the contract made no mention of taxation. The equipment-procurement title provided for reimbursement of Mesta "in the performance of the work under this Title" for

payments "under the Social Security Act, and any applicable State or local taxes, fees, or charges which the Contractor may be required on account of this contract to pay on or for any plant, equipment, process, organization, materials, supplies, or personnel." The gun-supply title recited that the contract price did not "include any tax imposed by any state, county, or municipality upon the transaction of this purchase of guns. The Government shall not be liable, directly or indirectly, for the payment of any such taxes, except that if the Contractor after using every effort short of litigation to procure exemption or refund, as the case may be, should be compelled to pay to any state, county or municipality, any tax upon the transaction of this procurement, an amount equal to the tax so paid shall be paid by the Government on demand of the Contractor, in addition to the prices herein stated." The Government admits liability to reimburse Mesta if it is obliged to pay tax by reason of the assessment in question here.

The machinery was bolted on concrete foundations in Mesta's plant on real property owned by it. It could be removed without damage to the building.

The present controversy flared when the assessing authorities of Allegheny County revised Mesta's previously determined assessment for ad valorem taxes. They added thereto the value of the machinery in question, fixed at $618,000. This included property acquired from other tool manufacturers as above described, $444,000; that manufactured by Mesta, $14,000; lathes brought from the Watervliet Arsenal, $160,000. Mesta protested and exhausted administrative remedies without avail, and on July 30, 1942, paid under protest $5,137.12, the amount of the tax attributable to this increased assessment.

Mesta took a timely appeal allowed by statute to the Court of Common Pleas. The United States petitioned to intervene, reciting that it would be required to reimburse Mesta by force of its contract. Intervention was permitted against objection by the County, and the United States has participated in the litigation since. Mesta attacked the assessment under both state and federal law, claiming that under the State Tax Law property belonging to another was not to be considered a part of its mill and that if construed to authorize assessment and taxation of this machinery, the statute violated the Federal Constitution.

The Court of Common Pleas held that the State Act authorized the assessment, but that the machinery here involved was "owned by the United States" and so for constitutional reasons could not be included.

The Supreme Court of Pennsylvania, on appeal of the County, reversed, and reinstated the assessment. It held that under the state law regardless of who held the title to it the machinery constituted a part of the mill for purposes of assessment and was properly assessed as real estate. It acknowledged that property held by the United States is "beyond the pale of taxation" by a state, but this assessment, it said, is not against the United States but against Mesta, which is operating its mill for private purposes. If Mesta defaulted in tax payments, the Court held that "the paramount rights of the government in the machinery could not be divested or in any way affected," hence the government could suffer no loss. Evidence that the machinery was not owned by Mesta it held to be irrelevant and improperly admitted. Two Justices dissented.

The United States and Mesta appealed and we postponed consideration of jurisdictional questions to the hearing on the merits.

I.

It is denied that the Government has valid title to the machinery. This contention is urged by the member cities of the National Institute of Municipal Law Officers, permitted to file a brief and to argue orally as *amici curiae*. Their position is that "the Government is subject to the legal rules applicable to private transactions." Under Pennsylvania law transfer of title to personal property to be good as against subsequent purchasers and lienors must be accompanied by delivery of possession. They say that inspection and acceptance by a contracting officer on behalf of the United States at the Mesta plant did not under decisional law of Pennsylvania amount to delivery of possession to the United States and hence that its title is defective. The position of the County is less extreme. It argued earlier in the litigation that the machinery became part of Mesta's real estate upon installation and that the United States had only "a reversionary interest after the termination of the contract." It later conceded that title to the property was not in Mesta "except for tax purposes." The Pennsylvania Supreme Court thought it immaterial

whether title was in the Government, but said, " . . . this private arrangement between the Mesta Company, the owner of the land and buildings and operator of the mill, and the Federal government, the owner of the machinery, which treats the equipment as personal property and permits the latter to remove it at the termination of the contract, can in no way change the legal effect of the Act of Assembly which specifically designates machinery, under these circumstances, as real estate for tax purposes."

We do not determine whether, under Pennsylvania law, the retention of possession by Mesta would protect only good-faith purchasers or lienors who relied upon it or whether, as urged by the *amici*, it also makes the Government's title imperfect as against these taxing authorities, who were fully advised of the Government's claim before the assessment was made. Even if the latter were true, we do not think the state law would be decisive of the question of title.

The Constitution provides that "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ." Art. IV, Sec. 3, cl. 2. It also gives Congress the power "To make all Laws which shall be necessary and proper for carrying into Execution" all powers vested in the Government or in any department or officer thereof, Art. I, Sec. 8, cl. 18, and it makes the laws of the United States enacted pursuant thereto "the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Art. VI, cl 2.

Every acquisition, holding, or disposition of property by the Federal Government depends upon proper exercise of a constitutional grant of power. In this case no contention is made that the contract with Mesta is not fully authorized by the congressional power to raise and support armies and by adequate congressional authorization to the contracting officers of the War Department. It must be accepted as an act of the Federal Government warranted by the Constitution and regular under statute.

Procurement policies so settled under federal authority may not be defeated or limited by state law. The purpose of the supremacy clause was to avoid the introduction of disparities, confusions and conflicts which would follow if the Government's general authority

were subject to local controls. The validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any state. *Clearfield Trust Co.* v. *United States*, 318 U. S. 363; *Jackson County* v. *United States*, 308 U. S. 343; *Carpenter* v. *Shaw*, 280 U. S. 363; *Utah Power & Light Co.* v. *United States*, 243 U. S. 389; *United States* v. *Ansonia Brass & Copper Co.*, 218 U. S. 452; see *D'Oench, Duhme & Co.* v. *Federal Deposit Ins. Corp.*, 315 U. S. 447; *Deitrick* v. *Greaney*, 309 U. S. 190; *Federal Land Bank* v. *Bismark Lumber Co.*, 314 U. S. 95. Federal statutes may declare liens in favor of the Government and establish their priority over subsequent purchasers or lienors irrespective of state recording acts. *Detroit Bank* v. *United States*, 317 U. S. 329; *United States* v. *Snyder*, 149 U. S. 210. Or the Government may avail itself, as any other lienor, of state recording facilities, in which case, while it has never been denied that it must pay nondiscriminatory fees for their use, the recording may not be made the occasion for taxing the Government's property. *Federal Land Bank* v. *Crosland*, 261 U. S. 374; *Pittman* v. *Home Owners' Loan Corp.*, 308 U. S. 21.

We hold that title to the property in question is in the United States and is effective for tax purposes.

II.

The County denies, however, that it is taxing property belonging to the United States. First, it says it taxes only the land, which the United States does not own; and the machinery is not taxed, but is considered only as an enhancement of the value of the land to Mesta, its owner. Secondly, it says the lien of the tax does not encumber and the process of collection does not involve any sale or other interference with the machinery. The Pennsylvania Supreme Court has upheld the questioned tax because upon these grounds it concluded that no interference with the federal function resulted.

"Where a federal right is concerned we are not bound by the characterization given to a state tax by state courts or legislatures, or relieved by it from the duty of considering the real nature of the tax and its effect upon the federal right asserted." *Carpenter* v. *Shaw*, 280 U. S. 363, 367-68.

It is not contended that the scheme of taxation employed by Pennsylvania is anything other than the old and widely used ad valorem general property tax. This taxation plan involves the identification and valuation of the variable individual holdings to be taxed, commonly called the assessment, the application of a uniform rate calculated on the need for public revenues, and the collection, in default of payment, by distraint and sale of the property assessed and taxed. This form of taxation is not regarded primarily as a form of personal taxation but rather as a tax against the property as a thing. Its procedures are more nearly analogous to procedures *in rem* than to those *in personam*. While personal liability for the tax may be and sometimes is imposed, the power to tax is predicated upon jurisdiction of the property, not upon jurisdiction of the person of the owner, which often is lacking without impairment of the power to tax. In both theory and practice the property is the subject of the tax and stands as security for its payment.

The Pennsylvania statutes embody this scheme of taxation. They are a century old. The basic provision reads: "The following *subjects and property* shall . . . be valued and assessed, and *subject to taxation.*"[3] Taxes are "declared to be a *first lien on said property.*"[4] [Emphasis supplied.] It is only under these legislative provisions that the tax in question is laid.

The procedure of the assessors is consistent with no other theory than that the machinery itself was being assessed and taxed exactly as land was being assessed and taxed. The Government-owned machinery was inspected and itemized by the assessor, each machine was then separately appraised by a machinery expert, and the aggregate full values of $618,000 were carried into the assessment. The assessment against Mesta was entered in the books of the assessors as follows: "Land, $293,795; Buildings, $1,123,124; Machinery, $2,489,085; Total assessment, $3,906,004." The machinery item included the value of the Government's property.

The assessors made no claim that the temporary presence of the Government's machinery actually enhanced the market value or the use value of Mesta's land. The assessors simply and forth-

[3] Penn. Stat. Ann. (Purdon) tit. 72, § 5020-201.

[4] *Id.*, tit. 53, §2022.

rightly valued Mesta's land as land, and the Government's machines as machinery, and added the latter to the former. We discern little theoretical difference, and no practical difference at all, between what was done and what would be done if the machinery were taxed in form. Its full value was ascertained and added to the base to which the annual rates would apply for county, city, borough, town, township, school, and poor purposes.

We hold that the substance of this procedure is to lay an ad valorem general property tax on property owned by the United States.

III.

It is contended, however, that Government title does not prevent such state taxation, because the incidence of the tax is borne by Mesta, not the Government, and the taxation creates no lien upon its property or interference with its function.

The Commonwealth certainly has broad powers and choices of methods to tax Mesta, a corporation created by it and domiciled and operating within its borders. The trend of recent decisions has been to withdraw private property and profits from the shelter of governmental immunity, but without impairing the immunity of the State or the Nation itself. Benefits which a contractor receives from dealings with the Government are subject to state income taxation.[5] Salaries received from it may be taxed.[6] The fact that materials are destined to be furnished to the Government does not exempt them from sales taxes imposed on the contractor's vendor.[7] But in all of these cases what we have denied is immunity for the contractor's own property, profits, or purchases. We have not held either that the Government could be taxed or its contractors taxed because property of the Government was in their hands. The distinction between taxation of private interests and taxation of governmental interests, although sometimes difficult to define, is fundamental in application of the immunity doctrine as developed in this country.

Mesta has some legal and beneficial interest in this property. It is a bailee for mutual benefit. Whether such a right of possession and use in view of all the circumstances could be taxed by appropriate proceedings we do not decide. Its leasehold in-

[5] James *v.* Dravo Contracting Co., 302 U. S. 134.

[6] Graves *v.* New York *ex rel.* O'Keefe, 306 U. S. 466.

[7] Alabama *v.* King & Boozer, 314 U. S. 1.

terest is subject to some qualification of the right to use the property except for gun manufacture, is limited to the period it engages in such work, and is perhaps burdened by other contractual conditions. We have held that where private interests in property were so preponderant that all the Government held was a naked title and a nominal interest, the whole value was taxable to the equitable owner. *Northern Pacific Ry. Co.* v. *Myers*, 172 U. S. 589; *New Brunswick* v. *United States*, 276 U. S. 547. But that is not the situation here, and the State has made no effort to segregate Mesta's interest and tax it. The full value of the property, including the whole ownership interest, as well as whatever value proper appraisal might attribute to the leasehold, was included in Mesta's assessment.

It is contended the whole value of the property may be reached since the impact of the tax is upon Mesta. In support of this we are reminded that the tax, so the Supreme Court of Pennsylvania held, falls upon the real estate alone, because the lien thereof does not touch the Government's property, which before or after tax default may be removed. But renunciation of any lien on Government property itself, which could not be sustained in any event, hardly establishes that it is not being taxed. The fact is that the lien on the underlying land is increased because of and in proportion to the assessment of the machinery. If the tax is collected by selling the land out from under the machinery, the effect on its usefulness to the Government would be almost as disastrous as to sell the machinery itself. The coercion of payment from compelling the Government to move its property and interrupt production at the Mesta plant would defeat the purpose of the Government in owning and leasing it.

We think, however, that the Government's property interests are not taxable either to it or to its bailee. The "Government" is an abstraction, and its possession of property largely constructive. Actual possession and custody of Government property nearly always are in someone who is not himself the Government but acts in its behalf and for its purposes. He may be an officer, an agent, or a contractor. His personal advantages from the relationship by way of salary, profit, or beneficial personal use of the property may be taxed as we have held. But neither he nor the Government can be taxed for the Government's property interest. Rarely does a state or municipality pursue the Federal

Government itself. Most of the immunity cases we have been called upon to deal with involved assertion of a right to tax Government property against an individual. In *United States* v. *Rickert*, 188 U. S. 432, this Court decided that improvements made upon lands to which the United States held title but which were put in possession of Indians for their benefit remained immune from taxation and that cattle, horses, and chattels purchased with the money of the Government and "put into the hands of the Indians to be used in execution of the purpose of the Government in reference to them" were likewise immune from taxation. In *Van Brocklin* v. *Tennessee*, 117 U. S. 151, Tennessee attempted to sell for state taxes lands which the United States owned at the time the taxes were assessed and levied, but in which it had ceased to have any interest at the time of sale. There, as here, it was claimed the collection affected only private persons, whose equities in the matter were at least doubtful, and that the United States could suffer no harm. The Court held, however, that the immunity protected the private owner for the tax had been laid against an interest of the Government which was beyond the reach of state taxing power. See also *Irwin* v. *Wright*, 258 U. S. 219; *Lee* v. *Osceola Improvement District*, 268 U. S. 643.

A state may tax personal property and might well tax it to one in whose possession it was found, but it could hardly tax one of its citizens because of moneys of the United States which were in his possession as Collector of Internal Revenue, Postmaster, Clerk of the United States Court, or other federal officer, agent, or contractor. We hold that Government-owned property, to the full extent of the Government's interest therein, is immune from taxation, either as against the Government itself or as against one who holds it as a bailee.

IV.

We find no support for the claim that the immunity has been waived. Congress certainly has not done so. It is true that the contract requires Mesta to obey and abide by the "applicable" law of Pennsylvania. But such language does not require Mesta to submit to unconstitutional exactions. It clearly is inadequate to waive federal immunity, even if we assume a contracting officer had power to do so. Likewise any contractual obligation of the War Department to pay Mesta's taxes does not operate either to

waive or to create an immunity. Nor is the validity of the tax dependent upon the ultimate resting place of the economic burden of the tax. We also think it immaterial what, if any, right of reimbursement the Pennsylvania law grants a lessee against a private lessor in similar circumstances. State law could not obligate the Central Government to reimburse for a valid tax, much less for an invalid one.

Each party urges equities in its favor. The Government points to the exigencies of war, points to numerous and increasing state efforts to tax such property, and urges against the decision below that it is a precedent for taxation of a substantial portion of property of the Government valued at 7½ billion dollars in the possession and use of private contractors engaged in war production. It owns property on private lands, under contracts similar to this, with a value approximating two billion dollars, over $257,000,000 of it located in Pennsylvania.

Appellees, and especially the *amici*, on the other hand, point for a different purpose to the amount of Government property in war production. It is said that increased municipal services, to serve and protect the influx of war workers, are required in all communities where large war contracts of this type are placed; that such local services rely heavily on real estate taxation; that to exclude property such as this, together with the large real estate holdings that have been and are being acquired by the Government, imposes this increased cost on others. While validation of assessments of this character will measurably increase the cost of waging the war, it is argued that the Federal Government may diffuse the cost throughout the country instead of putting a back-breaking burden on local governments where war plants are located. For these reasons we are urged to hold the position of the Government "unsound, as well as inequitable."

Such considerations remind us of our heavy responsibility in deciding the issues but hardly provide a guide or alter the usual principles for decision. The equities in this unfortunate conflict between the United States and one of its most important industrial communities are not capable of judicial ascertainment or equalization. Whether a county loses more than it gains by such federal activity, and what other federal benefits ought to be considered if a balance were to be struck between advantages and disadvantages, we cannot say. The adjustment of benefits and

burdens is for other departments, and studies to that end have been undertaken.[8] We can only say that our constitutional system as judicially interpreted from the beginning leaves no room for the localities to impose either compensatory or retaliatory taxation on Government property interests. Their remedy lies in petition to the Federal Congress, which also is their Congress.

V.

Our jurisdiction was questioned by appellee's motion to dismiss, and its consideration was postponed to hearing of the merits. The argument runs that the tax is laid only upon Mesta and therefore only Mesta can question its validity; that if Mesta does so, it can be only under the Fourteenth Amendment; that no question has been assigned under this Amendment and hence the appeal should be dismissed.

The questions in this case do not arise under the Fourteenth Amendment. They depend on provisions adopted and principles settled long before the Fourteenth Amendment and which exist independently of it.

The United States was admitted to the case as an intervenor. Both it and Mesta raised these questions of taxability, as either may do. The United States may question the taxation in order to protect its sovereignty over the property in question. Mesta as bailee is under a duty to protect the property and may protect itself from unlawful burdens put upon it because of its possession of the property. The tax is calculated and imposed on the land and machinery as a unit, the lien of the assessment on the machinery becomes a lien on the land which can be taken to pay

[8] See eport on Federal Contributions to States and Local Governmental Units with Respect to Federally Owned Real Estate, House Doc. No. 216, 78th Cong., 1st Sess. (1943). This comprehensive report shows the impossibility of generalizing about the equities between the Federal Government and a community in cases dealing with isolated properties. Much federally owned property is held for the accommodation and service of the locality, such as the Post Office or the courthouses. Other is held for general administrative purposes in which the locality has an interest or for the care of wards, such as veterans, in which local inhabitants share with others. The report considers all federally owned real estate and improvements, but not personalty. It shows that the United States had within Pennsylvania on June 30, 1937, property costing $278,519,000, with market value of $151,806,000. The estimated annual tax based on fair market value at local rates would be $3,152,000. But the average annual federal aid to that state is reported to be: 1928-30, $6,834,000; 1931-33, $10,791,000; 1934-37, all kinds, $190,071,000 (excluding FERA, CWA, and WPA: $23,118,000).

the tax occasioned by the machinery. Since the tax must be paid out of Mesta's property it is in a position to challenge the validity of the tax, as was the case in *Van Brocklin* v. *Tennessee, supra.* Both Mesta and the Government made timely insistence that the Pennsylvania Tax Law as applied violates the Federal Constitution. The highest court of the State rendered final judgment against the claim of federal right. We have jurisdiction by appeal. Judicial Code § 237(a). The motion to dismiss is denied.

The Tax Law of the Commonwealth of Pennsylvania as interpreted and applied in this case violates the Federal Constitution in so far as it purports to authorize taxation of the property interests of the United States in the machinery in Mesta's plant, or to use that interest to tax or to enhance the tax upon the Government's bailee. The judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Mr. Justice BLACK and Mr. Justice DOUGLAS concur in the result.

Mr. Justice ROBERTS.

I think the judgment of the Supreme Court of Pennsylvania is right and should be affirmed for the reasons stated in its opinion.

If *James* v. *Dravo Contracting Company*, 302 U. S. 134, were not upon our books, or had been decided the other way, I should agree to the opinion of the court. In that case, at the insistence of the United States, this court held that a State gross receipts tax upon payments by the United States to a contractor for erecting structures on United States property was valid because the tax was not laid upon the contract, the Government, its property, its officers, or its instrumentality; was laid upon an independent contractor and was nondiscriminatory. Although admitting that the payment of the tax imposed a burden upon the activities of the United States because it inevitably increased the cost of exercise of its functions, the court nonetheless sustained the exaction. I then thought, as I still think, that the decision overruled a century of precedents in this court.

It was not long before the Government repented its generosity. Four years later, it insisted, in *Alabama* v. *King & Boozer*, 314 U. S. 1, that a state sales tax upon a purchase of building ma-

terials by a contractor who was to incorporate them into a Government project, and where, upon delivery, inspection, and acceptance, they became the property of the Government, was so direct a tax on the Government as to infringe its constitutional immunity. The court, however, followed to its logical conclusion the decision in *Dravo* and expressly overruled earlier decisions inconsistent with *Dravo* and *King & Boozer*.[1] I concurred in that decision, feeling myself bound by the *Dravo* case.

In this case, as I think, the court necessarily reverts to the test of burdensomeness by a form of words and, as a result, again plunges the applicable principle into confusion.

The truth is that the tax liability of Mesta in respect of its manufacturing plant has been increased by the presence in the plant of machinery bailed to the taxpayer by the federal Government. It is true too that, either as a result of the express terms of the Government's contract with Mesta, the Government's monetary obligation to Mesta will be increased by the imposition of increased tax or, as in the *Dravo* case, if the contractor is liable for an increase of tax by reason of the fact that he is such contractor, the Government, in the long run, will have to pay more for goods and services as a result of such increase.

In order to relieve the Government of this burden, the court is now obliged to say that the law of Pennsylvania is something different from what the Supreme Court of the Commonwealth has declared it, and that a century of State administrative and judicial construction is meaningless when the supposed necessity arises to unburden the Government from the result of State taxation upon privately owned property.

The law of Pennsylvania is, and always has been, that a tax imposed on real estate is enhanced in amount by buildings and machinery placed upon the land with the consent of the owner even though he does not own the improvements but is a mere bailee. The lien of the tax extends only to the land owned by the taxpayer and the bailed improvements are neither under the lien nor subject to seizure or sale for payment of the tax. But this settled law is brushed aside and it is said, notwithstanding these facts, that, in some indefinable way, Pennsylvania has in truth levied an *ad valorem* tax upon property of the United States which is in the possession of Mesta as bailee. This is

[1] Panhandle Oil Co. *v.* Knox, 277 U. S. 218; Graves *v.* Texas Co., 298 U. S. 393.

nothing in substance but to say, in the teeth of the *Dravo* and *King & Boozer* cases, that if a tax levied upon a contractor of the Government imposes a burden upon the Government's activities it violates the constitutional immunity and must be stricken down. Whereas, in those cases, the court accepted the tax for what it was, viz., a tax upon the contractor and not upon the Government, here, although under State law the liability to the State is that of the contractor and his property, and can, in no event, be the liability of the Government or its property,—except as the Government either contractually assumes the burden or bears it as an incident of the contractor's burden,—the court announces that the tax is laid on the Government's property.

I think the case was decided by the court below on a nonfederal ground. The decision is pitched solely upon the character and incidence of the real property tax of the Commonwealth. As that court, in the light of a hundred years of history, defined the tax and the tax lien neither was laid upon or collectable from the United States or its property. As a result of that decision Mesta became liable for an increased tax as a result of certain transactions with the Government. Unless the doctrine of immunity from consequent burden on the Government, as the other party to the contract, is to be reimported into our jurisprudence, the appeal should be dismissed because the decision below was based upon an adequate nonfederal ground.

Mr. Justice FRANKFURTER, dissenting.

I should like to add a few words to the opinion of my brother ROBERTS, with which, in the main, I agree.

This controversy is treated by the Court as though it presented a challenge by Pennsylvania to the authority of the United States. The case is not entitled, on the facts as I understand them, to have such importance attributed to it. We are all agreed that a State must subordinate its policies to the constitutional powers duly exercised by the United States. War of course evokes powers of government not available in times of peace, but it is no less true than of the peace powers of the war powers of the Government, that the Constitution and the laws enacted in accordance with it are "the supreme Law of the Land". United States Constitution, Art. VI.

Implicit in our federal scheme is immunity of the Federal Government from taxation by the States. After having long been the subject of differences of opinion, the extent of this implied immunity was greatly curtailed. The basis of the doctrine was shifted from that of an argumentative financial burden to the Federal Government to that of freedom from discrimination against transactions with the Government and freedom from direct impositions upon the property and the instrumentalities of the Government. The decisions in *James* v. *Dravo Contracting Co.*, 302 U. S. 134, and *Alabama* v. *King & Boozer*, 314 U. S. 1, mean nothing unless they mean that it is not enough that the Government may ultimately have to bear the cost of a part or even the whole of a tax which a State imposes on a third person who has business relations with the Government, when a State could impose such a tax upon such a third person but for the fact that the transaction which gave rise to it was not with a private person but with the Government. So much for the scope of the implied immunity of the Government from state taxation as I understand the decisions to date. But in carrying on effectively the task committed to it, the United States can, I believe, go beyond the judicial doctrine of implied immunity from taxation. I have no doubt that Congress, by appropriate legislation, could immunize those who deal with the Government from sales and property taxes which States otherwise are free to impose.

On the record before us, Pennsylvania has not challenged the implied immunity of the Federal Government from taxation nor has she sought to tax that which Congress has said should be free from taxation. Pennsylvania has not taxed property owned by the Government. Pennsylvania has not used her otherwise unquestioned power of taxation to discriminate against one dealing with the Government. Finally, Pennsylvania has not tried to impose a tax which Congress, in order to facilitate war production, has forbidden the States to levy.

Pennsylvania merely seeks to enforce a tax assessment against the owner of lands and buildings in the manner in which she has made such an assessment for one hundred years. She has assessed real property concededly owned by Mesta at a valuation increased by the value of the machinery made available to Mesta by various arrangements with the Government. But it is the realty that is being taxed, precisely as other realty is taxed, and by pre-

cisely the same method of determining the value of other realty. If the machinery which has here been affixed to the land through arrangements with the Government had been machinery that belonged to Remington Arms and Mesta had been operating through Remington as a sub-contractor for the Government, I suppose no one would doubt that Pennsylvania could assess the value of the land taxed against Mesta as it was here assessed, quite regardless of the retention of the title by Remington of the annexed fixtures, the value of which served to enhance the amount at which the land was assessed. It cannot alter the nature of the tax as a tax against Mesta's ownership of the land and buildings whether the enhancing fixtures belong to the Government or Remington. Constitutional answers do at times turn on a nicety but not on a nicety without at least a nice significance.

The case thus appears to me one that was decided by the Pennsylvania Supreme Court on the settled construction of the Pennsylvania statute as a tax on realty, and not at all as a tax on the only thing that belongs to the United States, namely, machinery annexed to the realty. Here also "there can be no pretence that the Court adopted its view in order to evade a constitutional issue, and the case has been decided upon grounds that have no relation to any federal question". *Nickel* v. *Cole*, 256 U. S. 222, 225. The only interest which the State here taxed was an interest within the power of the State to tax; it was not a federal interest. See *Elder* v. *Wood*, 208 U. S. 226, 232; *New Brunswick* v. *United States*, 276 U. S. 547. The rate at which that interest was taxed is equally a matter for Pennsylvania to determine. In view of the *Bravo* case, *supra*, and *Alabama* v. *King & Boozer*, *supra*, there is not before us a constitutionally immunized burden of the Government. Insofar as the financial burden has been directly assumed by the Government it has been so assumed by arrangements which the contracting officers of the Government saw fit to make with Mesta.

In respect to the problem we are considering, the constitutional relation of the Dominion of Canada to its constituent Provinces is the same as that of the United States to the States. A recent decision of the Supreme Court of Canada is therefore pertinent. In *City of Vancouver* v. *Attorney General of Canada*, [1944] S. C. R. 23, that Court denied the Dominion's claim to immunity in a situation precisely like this, as I believe we should deny the claim of the Government.